United States Court of Appeals for the Second Circuit

APPENDIX

No. 77-6118 B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

LOUIS C. OSTRER, RITA OSTRER, JACK OSTRER
and DINA GELMAN,
Plaintiffs, Appellants

-against-

WILLIAM H. ARONWALD, ROBERT B. FISKE, JR.,
ALAN NAFTALIS, MARVIN SONTAG, JAMES KILLEEN,
EDWARD H. LEVI, and UNITED STATES OF AMERICA,

Defendants, Appellees.

On Appeal From The United States District Court For The
Southern District of New York.

UNITED STATES COURT OF APPEALS
FILED
OCT 3 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Appendix to Brief of the Plaintiffs, Appellants

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PAGINATION AS IN ORIGINAL COPY

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Ward,J.

PLAINTIFFS

OSTRER, LOUIS C.
OSTRER, RITA,
OSTRER, JACK and
GELMAN, DINA

DEFENDANTS

ARONWALD, WILLIAM I.
FISKE, ROBERT B. JR.
NAFTALIS, ALAN
SONTAG, MARVIN
KILLEEN, JAMES
LEVI, EDWARD H. and
UNITED STATES OF AMERICA

WJF

CAUSE

To enjoin prosecttion based on illegal wiretap.

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DATE	RECEIPT NUMBER	C.D. NUMBER
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JS-6	6-14-77

DATE	NR.	PROCEEDINGS
8-19-76		Fld Complt &Iss Summs
8-19-76		Fld Pltffs' OSC and TRO.....ret Part 1 on 8-28-76-11AM....Werker,J.
8-26-76.		Fld Pltff's affdvt of H. A. Sivlerglate,in connection with civ action.
8-26-76		Fld affdvt of pltff L. C. Ostrer, dtd 8-3-76.
8-26-76		by Fld affdvt of pltff A. Dershowitz, dtd 8-18-76.
8-26-76		Fld Pltff's affdvt by Nancy Rosner dtd 7-30-76.
8-26-76		Fld pltffs' afdvt by Richard H.Wynn dtd 7-30-76.
[illegible]		Fld Pltffs' memo of Law in support of req. relief.
8-26-76		Fld Certificate of Service of Affdvts & Memo of Law of pltffs....
8-23-76		Fld " " " " " " " " " "
8-26-76		Fld Pltffs' Suppl memo.
8-27-76		Fld Govt's Memo Of Law
8-31 76		Fld Opinion#45[illegible]24.. The TRO is vacated and the prel inj motion is denied.. The motion to refer is denied.. The atty for pltffs L. Ostrer and R. Ostrer do not have or maintain an office in this district. Their attention is called to Rule 4(a).. The court expects the attys in this matter to comply with these rules... So Ordered.. Werker,J. mn
09-01-76		Filed summons, with marshalls return served the following. The Atty. Gen. Wash, D.C. upon Certified mail #955 28 on 8-24-76. U.S. Atty S.D.N.Y. upon Ralph Lee on 8-24-76. James Killeen upon James Killeen on 8-24-76. Marvin Sontag Personal served on 8-25-76. Alan NAftalis Personal served on 8-24-76. Robert B. Fiske upon Ralph Lee on 8-24-76. W. I. Aronwald upon Personal served on 8-24-76.
10-5-76		Filed Marshal's return. Served: U.S.A. Atty Gen. Personally & Copy to Atty Gen. Receipt #955542 - 9-9-76.
11-22-76		[illegible] proceedings, dated 8-26-76 before Judge Werker
12-21-76		Fld Deft's Notice of Motion for an order pursuant to Rule 12(b) of the Federal Rules if Civil Procedure, dismissing the complt., and for such further relief as is just and proper.
12-21-76		Fld Deft's memorandum of Law in support of their motion to dismiss. etc.
1-4-77		Filed Stip & Order that pltffs are to file their briefs in response to defts motions to dismiss by 2-4-77.......WARD,J.
2-4-77		Filed Pltff's Memorandum of Law in Opposition to deft's Motion to Dismiss.
2-4-77		Filed Pltff's opposition to Deft's Motion to dismiss.
2-4-77		Filed H.A. Silvergate's Certificate of service of Pltff's Opposition to deft's motion to dismiss upon the deft.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
ES OSTRER, C. ET.AL.	WILLIAM E. ARONWALD,	DOCKET NO. 76-3701 PAGE 2 OF 3 PAGES

WARD.J.

DATE	NR.	PROCEEDINGS
-21-77		Filed Memo-End on motion filed on 12-21-76.....Motion granted in accordance with opinion filed herewith....So Ordered...WARD.J. m/n
1-77		Filed Opinion #46041.....The complaint fails to state a claim upon which relief can be granted.Accordingly, defts' motion to dismiss is granted.....So Ordered.....WARD.J. m/n
4-77		Fld Judgment....Ordered that defts W. I. Aronwald, R. B. Fiske, Jr.,A. Naftalis, M. Sontag, J. Klleen, E. H. Levi andthe U.S.A. have judgment against pltffs. L. C. Ostrer, R. Ostrer, J. Ostrer and D. Gelman dismissing bhe complt...... .....Clerk-6-24-77- mn
-21-77		Fld Pltff's Notice of Appeal to USCA from judgment dtd 6-21-77. Copy Mailed on 6- 25-77 to: US Asst Atty G. G. Copper.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------x

LOUIS C. OSTRER,
RITA OSTRER,
JACK OSTRER, and
DINA GELMAN,

Plaintiffs,

-against-

WILLIAM I. ARONWALD,
ROBERT B. FISKE, JR.,
ALAN NAFTALIS,
MARVIN SONTAG,
JAMES KILLEEN,
EDWARD H. LEVI, and
THE UNITED STATES OF AMERICA,

Defendants.

---------------------------------x

Civil Action
No.__________

PLAINTIFFS DEMAND
TRIAL BY JURY

COMPLAINT

Introduction.

1. This is an action seeking injunctive and related relief against certain officials of the United States Department of Justice, the Office of the United States Attorney, and the Organized Crime Strike Force for the Southern District of New York. Plaintiffs seek to enjoin an unethical and unlawful conspiracy and course of conduct being engaged in by the aforesaid prosecutorial authorities who have been using and

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continue to use improper, harassing, and indeed criminal, investigatory and prosecutorial tactics in an effort to coerce and extort from one of the Plaintiffs a waiver of his constitutional right against self-incrimination and force him to give certain testimony against several of said Plaintiffs' alleged business associates, irrespective of whether such testimony would be truthful or false, and in an effort to ruin the Plaintiffs' reputations and businesses.

2. This is, further, an action seeking injunctive and related relief against the use by the aforesaid prosecutorial authorities of immunized testimony and evidence derived therefrom and of illegally obtained evidence and its fruits against certain of the Plaintiffs, and against the use of privileged material that was wrongfully obtained and read by Government prosecutors.

Jurisdiction.

3. This Court has jurisdiction of this action pursuant to:

a) Title 18, United States Code, Section 2515 et seq. (governing prohibition of use as evidence of certain intercepted wire or oral communications or their fruits);

b) the First, Fourth, and Fifth Amendments to the United States Constitution;

c) Federal Rules of Criminal Procedure, Rule 41 (search and seizure), Rule 42 (criminal contempt), and Rule 6 (grand juries);

d) Title 28, United States Code, Section 2201 and 2202 (declaratory judgments), and Section 1331

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(Federal question), Section 1346 (United States as defendant), Section 1361 (action to compel officer of United States to perform his duty); and Section 2241;

e) this Court's inherent supervisory powers over the Federal Courts, Federal judicial and quasi-judicial proceedings, grand juries, and officers of the Court;

f) Title 18, United States Code, Sections 6001 et seq., and Murphy v. Waterfront Commission, 378 U.S. 52 (1964) (immunity);

g) The Sixth Amendment to the Constitution.

Unless relief is granted, Plaintiffs will suffer in excess of $10,000. in damages, exclusive of interest and costs.

Venue.

4. Venue is properly set in the Southern District of New York, as the plaintiffs all reside or do business here, the major defendants are located here, and the grand jury proceedings at issue are taking place here. Title 28, United States Code, Sections 1391(b), 1391(e), and 1402(a)(1).

Plaintiffs.

5. LOUIS C. OSTRER is a resident of New York and has business offices within the Southern District of New York. His primary occupation is that of a business and employee benefit expert. He is the son of Plaintiff Jack Ostrer, the husband of Plaintiff Rita Ostrer, and the brother of Plaintiff Dina Gelman. He is also the father of Benjamin Ostrer, not

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named as a Plaintiff herein.

6. RITA OSTRER, the wife of Louis Ostrer, is a resident of New York.

7. JACK OSTRER, the father of Louis Ostrer, is a resident of New York.

8. DINA GELMAN, the sister of Louis Ostrer, is a resident of New York and has a business office in the Southern District of New York on the same premises occupied by Louis Ostrer. She is a fringe benefit specialist and plan administrator.

Defendants.

9. WILLIAM I. ARONWALD is an attorney at law, a member of the Bar of this Court, a member and employee of the United States Department of Justice, and Chief of the Organized Crime Strike Force for the Southern District of New York. As such, he is in immediate charge and control of all investigatory and prosecutorial activity by the Strike Force within this District, including, but not limited to, the presentation of evidence and the proposal of indictments to the grand jury.

10. ROBERT B. FISKE, JR., is the United States Attorney for this District, and as such he has general supervision and authority over prosecutions and investigations in the District, and over the presentation and signing of indictments.

11. ALAN NAFTALIS is an attorney at law, a member of the Bar of this Court, a member and employee of the Department of

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Justice, a member of the Organized Crime Strike Force for this District, and the person immediately in charge and control over the investigation and prosecution of the Plaintiffs.

12. MARVIN SONTAG is an investigator with the Internal Revenue Service, is a member of the Organized Crime Strike Force for this District, and is involved in the investigation and prosecution of the Plaintiffs.

13. JAMES KILLEEN is an investigator with the Internal Revenue Service, is a member of the Organized Crime Strike Force for this District, and is involved in the investigation and prosecution of the Plaintiffs.

14. EDWARD H. LEVI is the Attorney General of the United States, and as such he has general and ultimate authority over and supervision of the Department of Justice and any and all Organized Crime Strike Forces.

First Cause of Action.

15. From approximately October 25, 1972, until the present time, all of the Plaintiffs, but in particular Plaintiffs Louis C. Ostrer and Dina Gelman, have been the subject of wiretaps and electronic surveillance planted, monitored, and carried out by New York City police officers assigned to the Rackets Bureau of the Office of the District Attorney, New York County (hereinafter "D.A.'s Office"), and possibly by other government agencies as well, at the office premises

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located at 377 Fifth Avenue in New York City.

16. The aforesaid electronic surveillance and wiretapping was and is violative of the Plaintiffs' rights under the Fourth Amendment to the Constitution and Title 18, United States Code, Section 2511. This wiretap and eavesdrop have been derivatively ruled illegal by the Supreme Court of the State of New York, have been stated to be illegal by a Judge of this Court, and have been admitted to be illegal by the Office of the United States Attorney for this District.

17. As a direct result of information gleaned from the aforesaid unlawful electronic surveillance and wiretapping, the D.A.'s Office obtained a search warrant, and pursuant to said warrant raided the offices at 377 Fifth Avenue, occupied by certain of the Plaintiffs, on or about February 21, 1973, and seized voluminous personal and business records belonging primarily to Plaintiffs Louis C. Ostrer and Dina Gelman. The aforesaid search warrant and resulting search and seizure were unlawful and in violation of the Plaintiffs' Fourth Amendment rights, for the reason, inter alia, that they derived from the aforesaid unlawful electronic surveillance and wiretapping.

18. New York officials have made information from the aforesaid unlawful electronic surveillance, wiretapping, and search and seizure, as well as of other unlawful searches and

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seizures conducted thereafter, available to, inter alia, members and staff members of the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate, the United States Department of Justice, the Internal Revenue Service, the Federal Bureau of Investigation, and the Department of Labor. In addition, information from the aforesaid unlawful electronic surveillance, wiretapping, searches and seizures, and their fruits, came into the possession of the New York State Insurance Commission, and was passed along to the aforesaid Federal authorities.

19. Information, material and documents from the aforesaid unlawful electronic surveillance, wiretappings, searches and seizures, and their fruits, furnished the primary if not sole basis for past, and continue to furnish the primary if not sole basis for the present investigations and threatened and potential prosecutions of the Plaintiffs by the Defendants. Such evidence is currently in the hands of, inter alia, members of the Strike Force in this District, and it is being presented, along with its fruits, to a currently-sitting Grand Jury. The Defendants have threatened and intend to seek an indictment against the Plaintiffs upon the basis of such unlawfully-obtained evidence. The use of the aforesaid unlawfully obtained evidence in a proceeding before any court or grand jury violates the Plaintiffs' rights under Title 18, United States Code, Section 2515, and the Fourth Amendment.

20. Unless relief issues from this Court, Plaintiffs ex-

pect to be indicted within days, and said indictment or indictments will be based primarily or entirely upon the aforesaid unlawfully-obtained evidence.

Second Cause of Action.

21. Pursuant to subpoena issuing from the Supreme Court of New York, New York County, as part of a grand jury and other investigations conducted under the supervision of the Office of the District Attorney of New York County, the Plaintiff Louis C. Ostrer gave testimony before a grand jury of the Supreme Court of New York, New York County for several days in March of 1974, for which testimony he was granted transactional immunity.

22. The subject matter of the aforesaid immunized grand jury testimony overlaps and is inextricably intertwined with the subject matter of the investigations and threatened prosecutions currently being undertaken by and under the supervision and direction of the Defendants, in that immunized testimony or the fruits thereof constitute all or a substantial part of the evidence being considered and gathered by the Defendants.

23. If such immunized testimony or evidence and leads derived from it, are allowed to be utilized in any way in the prosecution of Louis C. Ostrer, including any grand jury proceedings, his rights under the Fifth Amendment and 18 U.S.C. §§ 6001 *et seq* will be violated and he will be irremediably

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harmed, in that he will suffer, inter alia, the ignominy, burden, inconvenience, loss of reputation, damage to business, and stress that are associated with being the subject of an indictment, all on the basis of his own immunized testimony.

Third Cause of Action.

24. The Defendants purport to believe that the Plaintiffs, and Plaintiff Louis C. Ostrer in particular, have "connections with organized crime" and with "labor racketeers". The Defendants have no clear and definite definition of what it means to be "connected with organized crime" or with "labor racketeers". Instead, the Defendants have followed a policy of painting with a very broad brush and labelling anyone who has any acquaintance or does any (including legitimate) business with one suspected of being involved with "organized crime" or "labor racketeering" as one "associated" with "organized crime" and "labor racketeering". Such "associates" then themselves become targets of the Government because of their associations and their suspected knowledge of illegal activities by others.

25. The Defendants have labelled the Plaintiffs, and Plaintiff Louis C. Ostrer in particular, as "connected with organized crime and labor racketeering". However, the Government in general and the Defendants in particular have been and continue to be unable to prove that the Plaintiffs' own activities are unlawful or illegal, but the Defendants

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have nevertheless embarked on a conspiratorial effort to discredit the Plaintiffs in order to deprive them of their means of livelihood.

26. The aforesaid conspiratorial effort has been accompanied by a pattern of harassment and defamation aimed against the Plaintiffs. As part of such pattern of harassment, the Defendants, in cooperation with other state and Federal law enforcement agencies, have done, _inter alia_, the following:

a) They have or are attempting to summon the Plaintiffs before several grand juries, located in different jurisdictions, at approximately the same, or overlapping, or proximate times, to give testimony or evidence on essentially the same subjects and events;

b) they have raided, seized, subpoenaed and otherwise appropriated Plaintiffs' business records time and time again, frequently before different grand juries in disparate jurisdictions at the same or nearly the same time, with the aim of depriving the Plaintiffs of their records and of thereby making it impossible for them to conduct their business affairs in an orderly fashion, as a result of which some of the Plaintiffs' business enterprises have failed, and losses of millions of dollars have been incurred;

c) they have leaked to the news media, to the business world, and to the public in general, defamatory stories about the Plaintiffs aimed at eroding confidence in the integrity and ability of the Plaintiffs and in injuring their ability to do business;

d) they have made statements in open court and before Congressional committee inquiries, hearings and investigations, casting aspersions on and innuendos against the Plaintiffs' integrity, all without sufficient proof of criminal wrongdoing to sustain indictment and conviction, with subsequent publication of many such statements, aspersions and innuendos;

e) they have, in cooperation with other state and federal law enforcement and other agencies, tried to dissuade Plaintiffs' business associates from doing business with Plaintiffs by persuading such associates either that the Plaintiffs are dishonest, or that it is dangerous to associate with Plaintiffs;

f) they have engaged in repetitious and overlapping investigations of Plaintiffs' affairs year after year on a continual basis, in an attempt to wear down and exhaust the Plaintiffs, to distract them from their business affairs, and to cause them to expend exorbitant sums for legal and other professional representation.

27. As a result of the aforesaid pattern of harassment, the Plaintiffs have been seriously damaged personally and financially, their reputations sullied, their businesses nearly

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ruined, their peace of mind wrecked, their associations broken, and their lives thrown into disarray.

28. The aforesaid pattern of harassment has been engaged in by the Defendants and those in league with them as a substitute for lawful and orderly investigation and prosecution, because the Defendants recognize that the Plaintiffs have done nothing unlawful or illegal, since it is not unlawful or illegal to associate with, do legitimate business with, or know even those suspected of wrongdoing, yet the Defendants have wanted to punish Plaintiffs for such associations as a lesson to them and to others to avoid associating with those against whom the Government harbors misgivings or whom it suspects of wrongdoing.

29. All of the aforesaid activities by the Defendants have deprived the Plaintiffs of their rights under the First Amendment (freedom of speech and association), Fourth Amendment (freedom from unreasonable searches and seizures), and Fifth Amendment (taking of property and liberty without due process of law), and all the penumbras emanating from those constitutional amendments.

Fourth Cause of Action.

30. The Government, and the Defendants in particular, purport to believe that by virtue of his alleged "association" with labor unions and labor union officials -- who are pre-

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sumed to be "labor racketeers" and "organized criminals" -- the Plaintiff Louis C. Ostrer, possesses information potentially incriminatory with respect to such officials. As such, the Government and the Defendants have set upon a course of action aimed at forcing the Plaintiff Louis C. Ostrer to divulge to them everything he knows about such officials and all the details of his business dealings with such labor unions and labor union officials.

31. Despite the fact that the Government has no credible or usable evidence that Plaintiff Ostrer has committed crimes in his dealings with such labor unions and officials, the Defendants have been attempting, by threats of prosecution of Louis C. Ostrer and others, to force Louis C. Ostrer to give information and to testify against his business and personal associates.

32. The Government and the Defendants, knowing or believing that Louis C. Ostrer personally knows and/or deals with some of those designated as "organized criminals" or "labor racketeers", believe that Louis C. Ostrer is in a position to testify against such persons, and is in a position to be believed by a grand jury and petit jury by virtue of his personal knowledge of and dealings with such persons, regardless of whether Louis C. Ostrer's testimony be true or false. The Government and the Defendants are more interested in

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prosecuting and convicting such suspected "organized criminals" or "labor racketeers" than they are in adducing truthful information from Louis C. Ostrer. In effect, the Defendants wish to write a script and have Louis C. Ostrer deliver same under oath before the appropriate judicial bodies. Louis C. Ostrer has on numerous occasions, at times under oath, said that he does not possess the information the authorities seek; he has not been indicted for perjury for such statements. Yet Defendants persist in trying to get Louis C. Ostrer to give information and testimony against targets of their prosecutorial efforts.

33. As part of the aforesaid efforts to elicit information and testimony from Louis C. Ostrer, the Defendants have threatened, in the absence of Louis C. Ostrer's telling the Government what it wants to hear, to indict Louis C. Ostrer as well as members of his family, including Plaintiffs Jack Ostrer, Rita Ostrer, and Dina Gilman, as well as his eldest son Benjamin Ostrer (not a plaintiff herein).

34. The sole purpose of the Defendants' investigation and prospective attempt to indict the Plaintiffs and Benjamin Ostrer is not because the Government believes and has evidence that they have committed indictable offenses, but because the Defendants want to place maximum pressure on Louis Ostrer to give the testimony that they want to hear.

35. The Defendants are, in effect, holding Louis C.

Ostrer's relatives hostage unless and until he frees them with the "ransom" of testimony, regardless of the truth or falsity of such testimony, so long as it serves to indict and convict suspected "organized criminals" and "labor racketeers".

36. The Defendants have placed particular pressure on Louis C. Ostrer to "ransom" his son Benjamin Ostrer at this time, because Benjamin Ostrer, having graduated from law school in June of 1976, is currently undertaking efforts to join the Bar of the State of New York. The Defendants, recognizing the problems that an indictment (even without a conviction) would cause Benjamin Ostrer with respect to his Bar admission application, are holding Benjamin Ostrer as a hostage unless and until his father gives the information and testimony requested of him.

37. The Government has tried in the past to squeeze and coerce information and testimony out of Louis C. Ostrer, and has on several occasions offered to leave him alone if he cooperates. This time, however, the Defendants have added three generations of Louis C. Ostrer's family to the list of those threatened and harassed.

38. The Defendants plan to go forward with these prosecutions, in the absence of cooperation by Louis C. Ostrer, even if it does not believe it can win the cases before a petit jury.

39. The aforesaid course of conduct is in violation of

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the criminal laws of the State of New York, in that it constitutes coercion in the second degree.

40. The aforesaid course of conduct violates the Plaintiffs' rights under the First Amendment (right of association, right to familial association and privacy, freedom of speech), and the Fifth Amendment (due process of law and freedom from vicarious criminal liability, corruption of the blood, and abusive process).

41. The aforesaid course of conduct by the Defendants is against the public interest, against public policy, in violation of the Code of Professional Responsibility and legal ethical rules, a discredit to this Court insofar as a grand jury is being used as a tool for such nefarious ends, and in violation of civil and criminal laws.

42. Unless this course of conduct is stopped immediately, indictments will issue against Plaintiffs and against Benjamin Ostrer, causing irremediable damage to the Plaintiffs and causing them to have to defend indictments brought for unlawful reasons.

43. Unless this course of conduct is stopped immediately, indictments will issue against the Plaintiffs and against Benjamin Ostrer, causing irremediable damage to the Plaintiffs and causing them to have to defend against frivolous indictments.

44. Plaintiffs have no adequate remedy at law for the damage that would be done by further unlawful and improper investigations and indictments.

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Fifth Cause of Action.

45. Counsel for the Plaintiffs herein have been having discussions with members of the Strike Force over a period of weeks in recent months, concerning the Strike Force's investigations of and threatened prosecutions against the Plaintiffs, who are potential defendants in a criminal indictment or indictments. Plaintiffs' counsel have prepared file and other memoranda, notes, and similar legal materials, and have conferred with other persons or with their counsel who are familiar with matters related to the investigation and prosecution of Plaintiffs.

46. It is vital to the defense of Plaintiffs' legal interests that the aforesaid memoranda, notes, and similar legal materials, all of which are protected by the attorney-client and work product privileges, remain confidential and not fall into the hands of Government agents or prosecutors.

47. On or about July 14, 1976, Counsel for one of the Plaintiffs herein, Alan Dershowitz, Esquire, entrusted some privileged, confidential documents to Nancy Rosner, Esquire, an attorney representing William J. Kilroy, a former associate of Louis Ostrer and certain other Plaintiffs. Attorney Dershowitz gave said documents to Attorney Rosner in connection with his role in protecting the interest of the Plaintiffs in this action and on condition that she would keep same confidential. Counsel for all other Plaintiffs herein acquiesced in Attorney Dershowitz' entrusting said

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documents to Attorney Rosner.

48. Later in the day on July 14, 1976, Attorney Rosner had occasion to appear in Part I of this Court and argued against Defendant Alan Naftalis, Esquire, who represented the Government. During said court appearance, Attorney Rosner had among her papers a draft of a proposed affidavit of Plaintiff Louis C. Ostrer that had been prepared by Plaintiffs' counsel in connection with the investigation, prosecution, and discussions with the Government that are the subject of the instant action. Such draft affidavit was one of the aforesaid privileged confidential documents entrusted to Attorney Rosner by Attorney Dershowitz. At some point during the argument, Defendant Naftalis gained possession of said draft affidavit without the consent of Attorney Rosner, Plaintiffs, or Plaintiffs' counsel.

49. Despite the absence of consent and knowing that no such consent had been given, Defendant Naftalis read the draft affidavit and then delivered a copy to Defendant Aronwald, who also read the document. Neither Mr. Naftalis nor Mr. Aronwald are capable of forgetting or wiping out of their minds the contents of the document nor its implications in terms of the strategy, offense, and defense that have been and are being confidentially planned and prepared by Plaintiffs and their counsel.

50. As a result of the aforesaid, Plaintiffs' legal preparation has been seriously compromised by this breach in security and confidentiality, and their Sixth Amendment right to the effective assistance of counsel has been violated.

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Relief Sought.

WHEREFORE THE PLAINTIFFS PRAY:

1. Preliminary relief.

A. That this Court preliminarily enjoin the Defendants from presenting any further evidence relating to the Plaintiffs to the Grand Jury and from seeking indictments against Plaintiffs until a hearing and decision on the merits of this Complaint.

B. That this Court preliminarily enjoin the Defendants from seeking retaliation against the Plaintiffs or members of their immediate families as a result of the filing of this lawsuit.

C. That this Court preliminarily enjoin the Defendants from releasing or leaking to the news media and to others incriminating or defamatory or derisive stories about the Plaintiffs.

II. Permanent relief after a full evidentiary hearing on the merits.

D. That this Court make permanent the relief sought in A-C, *supra*.

E. That this Court order suppressed for use in any judicial proceedings whatever, including grand jury proceedings, any evidence obtained by unconstitutional or unlawful means, and any evidence obtained through the violation of the rights of the Plaintiffs, and fruits of same.

F. That this Court discharge the Grand Jury that has been hearing and receiving evidence presented to it by the Defendants against the Plaintiffs under the conditions and pursuant to the motives described in this Complaint.

G. That this Court order the Defendants to cease and desist from unlawful harassment of and interference with the Plaintiffs and their lawful activities and associations.

H. That this Court declare the Plaintiffs to be fully immunized with respect to the alleged crimes, evidence being presented to, and indictments being sought from, the Grand Jury.

I. That this Court award to the Plaintiffs actual damages in the sum of $20 million, and punitive damages in the sum of $ 30 million, plus the costs of this litigation, against the Defendants jointly and severally.

J. That this Court grant such other and further relief as it deems just and appropriate in the circumstances.

Respectfully,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

25

LOUIS C. OSTRER,
RITA OSTRER,
JACK OSTRER, and
DINA GELMAN,
Plaintiffs,

-against-

WILLIAM I. ARONWALD,
ROBERT B. FISKE, JR.,
ALAN NAFTALIS,
MARVIN SONTAG,
JAMES KILLEEN,
EDWARD H. LEVI, and
UNITED STATES OF AMERICA,
Defendants.

Civil Action No. 76 Civ. 3701

TEMPORARY RESTRAINING ORDER
and
ORDER TO SHOW CAUSE

WERKER, D.J.

The Court having received Plaintiffs' papers, including sworn affidavits in support of the relief requested, and having heard oral argument on this date, it is hereby ORDERED, that for a period of ten (10) days or until further order of this Court, whichever first occurs, the Defendants be, and they hereby are, temporarily restrained from presenting to the Grand Jury:

1) any evidence obtained directly or derivatively from unlawful wiretaps and electronic eavesdropping devices on any of the Plaintiffs, which wiretaps and eavesdropping devices are more particularly described in the Complaint filed in this action; and/or

2) any evidence obtained directly or derivatively from testimony given by any of the above-named plaintiffs or defendants ~~Defendant~~ under a grant of immunity conferred by the courts of the State of New York, which grant is more particularly described in the Complaint.

The Defendants are hereby ordered to Show Cause at a Part I session of this Court on the ~~21~~ 28th day of ~~August~~ August, 1976, at ~~9~~ 11:00 o'clock in the ~~[illegible]~~ fore noon, why this Court should not grant a preliminary injunction ordering the relief sought in the Complaint, or other appropriate relief.

Ordered ~~that~~ the defendants shall serve and file with the court answering papers on or before 2:00 P.M on August 24, 1976.

Henry F. Werker
United States District Judge

Done this 19th day of August, 1976, at New York, N. Y.

Signed at 4^{30} pm

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Service of a copy of this TRO acknowledged on 8/19/76 at 4:45 p.m.

Michael C. Eberhardt
Special Attorney
U.S. Dept. of Justice

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LOUIS C. OSTRER,
RITA OSTRER,
JACK OSTRER, and
DINA GELMAN,

Plaintiffs,

-against-

WILLIAM I. ARONWALD,
ROBERT B. FISKE, JR.,
ALAN NAFTALIS,
MARVIN SONTAG,
JAMES KILLEEN,
EDWARD H. LEVI, and
THE UNITED STATES OF AMERICA,

Defendants.

Civil Action
No.__________

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF REQUESTED RELIEF

Introduction.

This legal memorandum is filed in support of Plaintiffs' action seeking injunctive and related relief against the Defendants.

Plaintiffs are bringing this pre-indictment action as they have been informed by their attorneys (see accompanying affidavits of Alan Dershowitz, Esquire, Harvey A. Silverglate, Esquire, and Richard H. Wynn, Esquire) that the Department of Justice Organized Crime Strike Force for the Southern District

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is planning to seek indictments against Plaintiffs within days. They have also been informed by their attorneys that the Strike Force is willing to forego the indictments against them (and against Benjamin Ostrer, Louis C. Ostrer's son, not a plaintiff in this action) if Louis C. Ostrer agrees to co-operate and give information which the Strike Force believes they have against other individuals. While Louis C. Ostrer's cooperation will save all of the plaintiffs (and Benjamin Ostrer) from indictment, none of the others will be able to avoid indictment, even by their own willingness to themselves cooperate fully, unless Louis C. Ostrer also agrees to cooperate to the satisfaction of the Strike Force.

In this memorandum, Plaintiffs argue that this proposed deal is coercive (and would, indeed, constitute criminal coercion under New York State law) and is an abuse of prosecutorial power. Further, they allege that this is part of a long pattern of official harassment directed against them, and particularly against Louis C. Ostrer, intended to coerce his cooperation. This sustained conspiracy has caused them grievous harm, both in their personal lives and in their business affairs. They allege that this long campaign of harassment violates their rights under the Fourth and Fifth Amendments, and that indictments brought against them for the above stated reasons would also be violations of their Due Process rights.

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They further argue that the evidence upon which these indictments would be based is derived from illegal wiretaps which were placed on the business offices of Louis C. Ostrer. Use of the evidence against them would violate their rights under the Fourth Amendment and under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which specifically prohibits grand juries from using evidence derived from an illegal wiretap. Also, the transactions which are the subject of these indictments are closely related to testimony which Louis C. Ostrer gave under a grant of transactional immunity before a New York County grand jury [illegible]der the Fifth Amendment he is protected from indictment for these transactions and from the use against him of evidence derived from testimony or its fruits.

Finally, they argue that Defendants have obtained unauthorized access to a proposed draft affidavit of Louis C. Ostrer, prepared in anticipation of potential litigation. This draft affidavit incorporates some of the mental impressions, conclusions, opinions, and legal theories and strategies developed by Plaintiffs' counsel. As a result of this breach of confidentiality, plaintiffs' legal preparation has been seriously compromised and their Sixth Amendment right to the effective assistance of counsel has been violated.

As relief, plaintiffs first seek an evidentiary hearing in order to prove that the evidence against them is tainted. They further seek injunctive relief against defendants from presenting this evidence to a grand jury or from seeking indictments against them for the transactions which are the subject of these prospective indictments. They also seek damages for the harm already caused them.

Plaintiffs maintain that it is well within the power of the court to grant this relief under the court's supervisory and equitable powers, and that, indeed, relief is mandated by constitutional and statutory law.

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Bases of Jurisdiction

The Court's jurisdiction over this action is premised on a number of different constitutional and statutory grounds.

Plaintiffs first allege a violation of their rights under the Fourth Amendment and under §2515, 18 U.S.C., the evidentiary prohibition of Title III of the Omnibus Crime Control and Safe Street Act of 1968. Section 2515 provides that:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

They seek a suppression hearing to rule on this violation under §2518(10)(a), 18 U.S.C., which provides that any "aggrieved person" may move for the suppression of evidence derived from an illegal wiretap, and under Rule 41(f), F.R.Crim.P. Plaintiffs have standing as "aggrieved persons" under §2518(10)(a), as they are all subjects of unlawful electronic surveillance. See Alderman v. United States, 394 U.S. 165 (1969).

The court's power to hold this hearing and to order the suppression of the evidence prior to indictment is derived from its general supervisory and equitable powers and from its inherent authority over those who are its officers.

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This power has been firmly recognized in this district and Circuit, and in other Circuits as well. See United States v. Maresca, 266 F. 713 , 717 (S.D.N.Y. 1920) In Re Fried, 161 F.2d 453 (2ndCir. 1947), Grant v. United States, 282 F.2d 165, 168 (2nd Cir. 1960), Hunsucker v. Phinney, 497 F.2d 29 (5th Cir. 1974), and Smith v. Katzenbach, 351 F.2d 810, 816 (D.C.Cir. 1965).

Plaintiff Ostrer's claims that he cannot be indicted for crimes regarding which he testified before a New York state grand jury under a grant of transactional immunity and that evidence derived from such testimony cannot be used against him are based upon his Fifth Amendment privilege against self-incrimination as recognized in Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964), and upon §6002, 18 U.S.C., which prohibits the use of immunized testimony against a witness in any subsequent criminal case, including proceedings before a grand jury. See United States v. Catalano, 491 F.2d 268 (2nd Cir. 1974). He seeks a pre-indictment hearing at which the prosecution must prove that his Fifth Amendment rights are not being violated (see Kastigar v. United States, 406 U.S. 441, 460-461 (1972) and Goldberg v. United States, 472 F.2d 513 (2nd Cir. 1973)), which the court has power to grant under its general supervisory and equitable powers. See United States v. Maresca, supra.

Plaintiffs seek relief from the threat of a harassing prosecution on the basis of their rights under the Due Process Clause of the Fifth Amendment, which prohibits the use of prosecutorial power for vindictive and improper purposes, see Blackledge v. Perry, 417 U.S. 21 (1974), and on the basis of their First Amendment right of freedom of Association, under which they are protected from the imposition of any penalty or from any efforts to chill the exercise of that right. They have standing to seek to enjoin these prosecutions as they are under the threat of imminent indictment. See Linda R.S. v. Richard D., 410 U.S. 616, 619 (1973), Poe v. Ullman, 367 U.S. 497, 501 (1961).

The court has the power to hear these claims and grant relief by enjoining indictment under its Rule 6, F.R.Crim.P., control over the tenure and powers of a grand jury, and under its general supervisory and equitable powers under which it can prevent the use of prosecution for improper purposes. See Dixon v. District of Columbia, 394 F.2d 966 (D.C.Cir. 1968), United States v. Maresca, supra.

The plaintiffs also allege a violation of their Sixth Amendment right to effective assistance of counsel. They seek to enjoin their indictments on the ground that the Government has impermissibly, unfairly, and irremediably breached their attorney-client privilege. Analogous relief for such violations when raised at different procedural junctures -- in particular, dismissal at the post-indictment stage, and reversal at the post-conviction stage, -- is commonplace. United States v. Gartner, 518 F.2d 633 (2nd Cir. 1975), cert. denied, __U.S.__, 96 S.Ct. 222 (1975),

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and In Re Turkeltoub, 256 F.Supp. 683 (S.D.N.Y. 1966).

Jurisdiction is also premised upon Title 28, United States Code §1331, §1346, §1361, and §2241. This action satisfies the jurisdictional amount requirement as plaintiffs allege damages well in excess of $10,000.*

The United States Attorney for the Southern District is named as a defendant as all recommendations for indictment and prosecution by the Strike Force must be reviewed and approved by him. Ultimately all indictments and informations must be signed by the United States Attorney. The Attorney General is named as a defendant as the Strike Force in each district operates under his supervision through the Assistant Attorney General in charge of the Criminal Division. See Department of Justice Guidelines Governing Inter-Relationships Between Strike Forces and United States Attorneys' Offices. Appendix to In Re Subpoena of Persico, 522 F.2d 41 (2nd Cir. 1975).**

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*The courts of this Circuit have adopted a liberal standard in reading allegations of jurisdictional amount where constitutional rights and liberties are at stake. See Fifth Avenue Peace Parade Committee v. Hoover, 327 F.Supp. 238 (S.D.N.Y. 1971).

**It is not alleged that either of the above public officials have personally engaged in or approved of the conduct of the Strike Force challenged herein.

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The Government Should be Enjoined From Presenting to a Grand Jury any Evidence Tainted by the Illegal Wiretaps and Electronic Eavesdrops of Plaintiffs' Conversations.

The plaintiffs in this action were the victims of illegal wiretap surveillance of Louis Ostrer's business offices at 377 Fifth Avenue, New York City, from October 25, 1972 to February 21, 1973.* Conversations of all of them, or on their premises, were intercepted by this surveillance. Therefore, all qualify under 18 U.S.C. §2518(10)(a) as "aggrieved persons" who can assert the statutory protections and rights created by the Federal wiretapping statute, 18 U.S.C.(c. 119)§§2510-2520, as well as the rights protected by the Fourth Amendment. See Alderman v. United States, 394 U.S. 165, 178 (1969).

Section 2515 of the wiretap statute enlarges upon the constitutional prohibitions against the use as evidence of illegally intercepted conversations. It prohibits the admission of the contents of illegally intercepted conversations and any "evidence derived therefrom" in the proceedings of a grand jury. In United States v. Calandra, 414 U.S. 351 (1974), the Supreme Court held that the Fourth Amendment does not require the exclusion of certain illeg-

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*As Judge Brieant explains in his opinion ruling on Louis Ostrer's motion for a new trial in United States v. Ostrer, (71 Cr. 558-CLB, June 4, 1976), the Ostrer wiretap was illegal as it was the "fruit" of another related wiretap held illegal by a New York State Court on February 4, 1975.

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ally seized evidence from consideration by a grand jury. However, the Court was careful in Calandra to reaffirm its holding in Gelbard v. United States, 408 U.S. 41 (1972), where it construed §2515 to prohibit the presentation before a grand jury of evidence obtained directly or indirectly from an illegal wiretap. 414 U.S., at 354, n. 11.

Probable cause for the search of Louis Ostrer's business offices on February 21, 1973, was derived solely from the illegal wiretap and eavesdrop. The evidence derived from that search, which includes several years of records and documents relating to Ostrer's business and personal activities (see the accompanying partial IRS inventory [appendix "A" hereto] for an indication of how large a quantity of materials was seized), is, therefore, tainted by the illegal wiretap, as evidence is tainted when it "'has been come at by exploitation of that illegality...', Maguire, Evidence of Guilt 221 (1959)." Wong Sun v. United States, 371 U.S. 471, 487-488 (1963).

The taint of the wiretap certainly extends to the current criminal investigation and threatened prosecution of the Ostrers. These business and personal papers seized in the illegal search constitute a fairly complete picture of the business and personal activities of Louis Ostrer and his family and associates for a period of several years. An investigation of them for tax violations, or for any violations connected with their business and personal activities, must necessarily be based on a careful perusal of all of these

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documents.

This investigation is surely tainted in a variety of ways. The decision to undertake the criminal tax investigation was most probably made following perusal of the seized documents. The entire criminal tax investigation is, therefore, tainted, even if there was an ongoing civil tax investigation which preceded the search. See United States v. Schipani, 289 F.Supp. 43, 61 (E.D.N.Y. 1968), affirmed, 414 F.2d 1262 (2nd Cir. 1969). Even if the decision to investigate is not tainted, to the extent that the seized documents and fruits derived therefrom were consulted in the course of the investigation, all leads and evidence which develop as a consequence are tainted. As the Court of Appeals stated in United States v. Paroutian, 299 F.2d 485, 489 (2nd Cir. 1972), "an unlawful search taints all evidence obtained at the search or through leads uncovered by the search".

The testimony of a witness who is discovered, directly or indirectly, as a result of an illegal wiretap, or who is asked questions derived from the wiretap or the fruits, is also tainted by the wiretap and is thus inadmissible before a grand jury under §2515. Gelbard v. United States, 480 U.S. 41 (1972).* In United States v. Tane, 329 F.2d 848 (2nd Cir.

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*This case is unlike United States v. Capra, 501 F.2d 267, 281 (2nd Cir. 1974), where, as the opinion states, "There is no indication in the record nor was there a claim by any of the defendants that the police identified [the witness] or asked him to testify as a result of the evidence uncovered by the wiretap."

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1964) the court dismissed an indictment based upon the testimony of a witness discovered by means of an illegal wiretap. This holding was reaffirmed in United States v. Huss, 482 F.2d 38 (2nd Cir. 1973). There the Court of Appeals (citing Tane) announced as a rule of this Circuit "the view that the Government may not rely on the testimony of a witness that is based on the discovery of that witness's identity in the course of unlawful electronic surveillance." Id. at 46.

Even if the Strike Force has not itself examined documents obtained by some agency directly from the search (a highly unlikely possibility), it has worked closely on this investigation with agencies which have undoubtedly used them. As explained in the accompanying affidavit of Louis C. Ostrer (and evidenced by the partial IRS inventory), the IRS took under summons all of the materials seized in the search after they were ordered to be returned to Ostrer by a New York State court judge. Members of the IRS have worked on this investigation as part of the Strike Force (see affidavits of Richard H. Wynn and Harvey A. Silverglate), and as this is at least in large part a criminal tax investigation, the IRS is playing an important role in its preparation. In addition, the Strike Force has had contacts with, and issued subpoenas on, the New York State Insurance Department, which is involved in a parallel investigation and has studied and used the seized documents. Furthermore, the United States Department of Labor

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is also involved in the investigation.

A somewhat similar pattern of different agencies and offices tainting each other's investigations is found in United States v. Maggadino, 495 F.2d 455 (2nd Cir. 1974). There, two offices of the FBI and the local and state police were involved in separate but similar investigations of defendants' gambling activities. The local police had a wiretap (later ruled illegal) on defendant's telephones. On the basis of those wiretaps the local police developed information and leads which they passed on to one of the FBI offices, which in turn exchanged information with the other. The district court dismissed the federal prosecution on the ground that it was tainted by the illegal state wiretap.

In this case another source of taint on the Government's investigation is the IRS' examination of the Plaintiffs' papers at the New York District Attorney's office without court approval and its issuance of a summons for those papers after a New York Supreme Court Judge had ordered them returned. The IRS violated Louis Ostrer's rights under the Fourth Amendment when it examined, without permission, his papers at the D.A.'s office, since clearly it would not have been allowed to do so without a court order if the papers had remained in Ostrer's custody. In United States v. Birrell, 470 F.2d 113 (2nd Cir. 1972), a federal prosecutor examined the defendant's papers without a warrant while they

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were still in custody of the city police. The Court stated: "We fail to see how the taking into custody by the city police, proper though we have held this to be, relieves federal authorities from a requirement that would have existed if Birrell's papers had been left where they were. The propriety of the first intrusion into Birrell's privacy does not automatically sanction a second." Id., at 117. In this case as well, the IRS's unconsented search of Plaintiffs' papers constitutes a second invasion of their Fourth Amendment rights. The violation of privacy rights is even greater in this case, than in Birrell, as here there is no similar legitimacy to the initial seizure. Here there was exploitation by the IRS of an opportunity provided by the D.A.'s tainted search and seizure.

The IRS's subsequent summons upon the D.A.'s office is, under these circumstances, a further violation of the Plaintiff's Fourth Amendment rights and an abuse of the IRS's summons power. In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the Court held that the Government may not turn around and subpoena documents which it initially seized in an illegal search and has been required to return. As the Court states, it "reduces the Fourth Amendment to a form of words" for the Government to illegally seize papers, "study the papers before it returns them, copy them, and then...use the knowledge that it has gained to call upon the owners in a more regular form to produce them." Id. at 391. And yet, that is precisely what the IRS did when it served its summons upon the D.A.'s office after the D.A. had been ordered by a New York State judge to return the papers to the Plaintiffs.

The issuance of the summons by the IRS was an abuse of its statutory power. The IRS may not use its summons power in aid of a criminal investigation. United States v. Henry, 491 F.2d 702 (6th Cir. 1974). However, when the IRS issued its summons it allowed the papers to remain at the D.A.'s office for the entire period during which it continued to examine them. Presumably, the D.A. still had access to those papers. The IRS summons thus assisted the D.A. to retain possession of the seized papers and to frustrate the state court's return order. This is clearly an even more flagrant abuse of the summons power than when used in support of a criminal investigation pursuing a legitimate purpose.

A criminal investigation made possible by this series of constitutional and statutory violations should not be allowed to proceed.

The Court Must Order That An Evidentiary Hearing Be Held In Order To Determine Whether The Criminal Investigation Of The Plaintiffs Is Tainted.

1. Plaintiff's claim satisfies the conditions for ordering an evidentiary hearing.

In Alderman v. United States, 394 U.S. 165, 183 (1969), the Supreme Court stated the conditions under which an evidentiary hearing (or a taint hearing) must be held in order to determine whether illegal wiretapping has tainted a criminal investigaton. Before the court is required to convene a taint hearing the complaining party must demonstrate that he has been the subject of an illegal wiretap. Once the use of wiretapping is established -- as it has been in the instant case -- the court must grant the complainant the opportunity, at a taint hearing, to probe the extent to which the Government's case against him is tainted.

The function of the taint hearing cannot be adequately performed by the expedient of having the Government submit affidavits on the extent to which its investigation has been tainted. Where the matter in contention is the simple factual issue of whether there has been electronic surveillance by the Government, the submission of Government affidavits affirming or denying wiretapping, without an evidentiary hearing, may under some circumstances be sufficient. See In Re Buscaglia, 518 F.2d 77 (2nd Cir. 1975). (But see United States v. Grusse, 515 F.2d 157, 158 (2nd Cir. 1975) where denial of wiretapping through testimony by an

Assistant United States Attorney was required in addition to an affidavit.) However, it has never been held or suggested that the question of whether wiretapping or its fruits have tainted an investigation could be resolved by means of affidavits.* The determination as to whether an investigation is tainted is very different than a determination as to whether there has been wiretapping. First, it often involves factual issues of much greater complexity. Alderman requires that the question of taint be resolved in an adversary proceeding, precisely because the superiority of adversary proceedings is proven "where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among facts reflected by these records." 394 U.S. at 183. Second, the claim that an investigation is not tainted is a conclusion of law as well as of fact about the evidence presented. As such, it is best tested in argument. The statement of such a conclusion in an affidavit is obviously no substitute, as even the good faith belief of Government agents and attorneys that their case is not tainted cannot be dispositive.

2. At the evidentiary hearing the Government bears the ultimate burden of proving discovery through an independent legal source, or at the very least of proving inevitability of discovery of the evidence.

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*In this Circuit, and others, Government affidavits have been found sufficient only on the question of the existence of wiretapping. See also United States v. Van Arsdell, 521 F.2d

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At the taint hearing the complaining party bears the burden of going forward with evidence proving "that a substantial portion of the case against him was the fruit of the poisonous tree." Once he has done so, the Government bears the ultimate burden of convincing the trial court that it has come upon the evidence by independent means. Alderman v. United States, supra, 183. See also United States v. Maggadino, 495 F.2d 455, 459-460 (2nd Cir. 1974). On the basis of the links already known between the Government's current investigation and these seized documents, it is difficult to imagine how the Government could possibly satsify that burden.

The Government cannot meet its burden of proof by showing that it would inevitably have come across its evidence (both witnesses and documents) by other, lawful means. "The test must be one of actualities not possibilities." United States v. Paroutian, supra, 299 F.2d 486,489. In this case, then, it is not a sufficient defense for the Government to claim that its case is not tainted as its decision to investigate the Ostrers preceded the search and it would have come across the same documents at the Ostrers' offices pursuant to an IRS summons. As the Court of Appeals stated in United States v. Cole, 463 F.2d 163, 174 (2nd Cir.

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*(continued from page -16-) 1323 (2nd Cir. 1975); In Re Millow, 529 F.2d 770 (2nd Cir. 1976); United States v. Moeller, 422 F.Supp. 49 (D.Conn. 1975); and Matter of Grand Jury, 524 F.2d 209 (10th Cir. 1975), which surveys the law in other circuits.

1972), "...the question is not whether the government would have in the normal course of events, discovered the evidence by independent legal sources, but whether in fact they did actually make the discovery from independent legal sources." When, of course, the Court finds that the Government has relied on independent, legally obtained evidence, then the illegally obtained evidence will not necessarily taint the investigation. See, e.g., United States v. Falley, 489 F.2d 33, 40 (2nd Cir. 1973).

Even if the Government chooses to argue in defense that it would have inevitably come across the tainted evidence in due course, it must make that claim with particularity, in regard to specific pieces of evidence. This requirement is necessary as, in fact, the Government's access to the Plaintiffs' papers would have been much more limited had it proceeded pursuant to summons or subpoena, as it had originally expected. Had the IRS carried out its examination of the Ostrers' papers pursuant to an IRS summons, it would not have been able to freely rummage through them, as it was able to do when it examined the papers at the D.A.'s office. Any summons which sought blanket access to everything in the Plaintiffs' offices would have been subject to challenge on grounds of overbreadth, relevance and materiality. See United States v. Malnik, 489 F.2d 682, 686 (5th Cir. 1974). Furthermore, had the IRS sought by summons to examine any and all of the documents seized in the search, Plaintiffs

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would have had the right to refuse permission and to require the Government to seek compliance through a judicial enforcement proceeding. See Reisman v. Caplin, 375 U.S. 440 (1964). At the hearing, Plaintiffs could have asserted their Fifth Amendment and other privileges regarding certain of the documents, blocking IRS access to them. However, as the IRS saw the Ostrers' office papers (both before and after their issuance of the summons) in their entirety at the D.A.'s office, it was faced with none of these limitations.*

As part of its burden of proving the inevitability of discovery the Government should be required to point to individual documents, or groups of documents, which it is using in its case against the Plaintiffs and show that these would have been available to it pursuant to an IRS summons or subpoena. It is then up to the Plaintiffs to assert any claims regarding privilege or relevance by means of which they would have denied the Government access to the documents had the illegal seizure not taken place.

This allocation of burden is in accord with the requirements of Alderman and with the general standards for the allocation of burdens of pleading and proof and is the most fair. Often an important consideration in allocating burdens

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*The most persuasive evidence that the seizure gave the IRS a freer hand to investigate and to rummage than it would have had if the papers had never been removed from the Ostrers' offices, is the fact that the IRS chose to serve its summons on the New York District Attorney (and to examine the papers at his offices), rather than to see the papers returned to the Plaintiffs.

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is which side can be expected to have greater knowledge of the facts in question. See McCormick on Evidence (2nd ed.) § 337. Clearly the Government is in a better position than the Plaintiffs to know the direction its investigation is taking and what evidence is relevant and useful to that investigation. It would be extremely wasteful of the Court's and the parties' time and resources to require Plaintiffs to produce all of the documents which they believe the Government might be interested in but which would have been protected against summons or subpoena on grounds of relevance and materiality. Also it would be unfair to have the Plaintiffs search their papers for documents which might possibly be incriminating, and therefore, protected by the Fifth Amendment privilege against self incrimination, or protected by other evidentiary privileges.

3. An evidentiary hearing should be held prior to indictment.

It is clear that a taint hearing should be held now, prior to indictment, so that the Government can be enjoined from presenting tainted evidence to a grand jury. Section 2515 is intended to prevent grand juries from hearing evidence tainted by illegal wiretaps. The Supreme Court has construed §2515 to require preventive rather than only remedial court action when there is a serious possibility that a grand jury will hear tainted evidence. In Gelbard v. United States, 408 U.S. 49 (1972), the Supreme Court held that when a grand

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jury witness refuses to answer questions on the ground that they are tainted by illegal wiretapping, the claim must be adjudicated before the witness can be required (by means of a contempt finding) to answer.* More specifically, this Circuit has determined that pre-indictment suppression hearings in situations like this should be held and appropriate motions for relief granted by a District Court under its inherent supervisory powers. Grant v. United States, 282 F.2d 165, 168 (2nd Cir. 1960). See also Fifth Avenue Peace Parade Committee v. Hoover, 327 F.Supp. 238, 242 (S.D.N.Y. 1972), Hunsucker v. Phinney, 497 F.2d 29 (5th Cir. 1974). The occasion for exercise of that power is most appropriate when indictment is imminent, Lord v. Kelley, 223 F.Supp. 684, 689 (D.Mass. 1963), and plaintiff makes a strong prima facie showing that tainted evidence will form the basis of the indictment. Both of those conditions are met in this case.

4. Plaintiffs' rights are not adequately protected by the litigation of taint claims by potential grand jury witnesses who are "fruits" of the tainted evidence.

It is clear that the constitutional and statutory rights of the Plaintiffs cannot be protected by assertion of similar claims of taint by potential grand jury witnesses who seek to

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*The limitation on that holding by In Re Persico, 491 F.2d 1156 (2nd Cir. 1974) is not here applicable as the question of the wiretap's illegality has already been settled in a prior state proceeding and is not in issue.

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quash their subpoena on the ground that they were discovered (and the inquiries made of them were developed) by means of the tainted evidence. The inquiry pursued at an evidentiary hearing by a potential grand jury witness will be focussed only on possible chains of taint leading to his own discovery. Plaintiffs, however, clearly have the broader interest in uncovering the extent to which the entire investigation against them, including all potential witnesses and evidentiary leads, has been tainted. Their inquiry would necessarily reach issues not relevant to the claim of a particular witness. They may well also have broader standing to pursue certain claims than would any single grand jury witness. Second, even when a potential witness adequately litigates but loses on the issue of his own taint, that question should remain open to Plaintiffs as a subject of inquiry at their hearing. This latitude is necessary given the interests which are at stake for the Plaintiffs. The harm which Plaintiffs seek to prevent is the harm of an unwarranted indictment itself. While the rights of a grand jury witness who loses at a contempt hearing are protected by the possibility of a subsequent appeal, the Plaintiffs' only opportunity to fully protect themselves against indictment is obviously at the pre-indictment stage. Their right not to be indicted on the basis of evidence tainted by illegal wiretaps can, therefore, only be adequately protected if they are afforded their own evidentiary hearing in which to litigate fully the issue of

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taint. For these reasons, the Court should order an evidentiary hearing.

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Defendants Should Be Enjoined From Indicting Plaintiff Louis C. Ostrer For Crimes Relating To Testimony Which He Gave Under Grant Of Transactional Immunity, Or From Introducing Before The Grand Jury Any Evidence Derived From Such Granted Immunity.

In February and March of 1974, plaintiff Louis C. Ostrer appeared as a witness before a New York County grand jury and answered, under a state grant of transactional immunity*, thousands of questions which probed deeply into all aspects of his financial affairs, both personal and business. His grand jury testimony contains extensive details about his income, his personal loans, and his business affairs and practices. The landmark opinion in Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964), guarantees Ostrer that, at a minimum, a "state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in

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*The relevant New York statute, New York Criminal Procedure Law §190.40, provides that:

> 1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.
>
> 2. A witness who gives evidence in a grand jury proceeding receives immunity...

Immunity is defined in New York Criminal Procedure Law §50.10(1) as follows:

> "'Immunity.' A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture on account of any transaction, matter or thing concerning which he gave evidence therein, possesses 'immunity' from any such conviction, penalty or forfeiture."

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connection with a criminal prosecution against him." [emphasis added] Id., at 79.

Murphy, however, left open the question of whether and under what circumstances the Federal Government is obliged to respect the broader protection of transactional immunity on a state witness' testimony when the state has chosen to confer transactional immunity (rather than mere use immunity) in order to secure his testimony.

In the instant case, Due Process and fundamental fairness both require that the Federal Government recognize the state's grant of transactional immunity to Louis Ostrer. To Ostrer, the New York Grand Jury investigation appeared to be only one further link in a long chain of cooperative efforts by Federal and State law enforcement agencies to secure information leading to the conviction of alleged "organized crime figures" with whom he was believed to have had contact. The transfer of illegally seized documents from the New York County District Attorney's Office to the Federal Internal Revenue Service was but one of the many incidents which confirmed such a belief. In light of the active collaboration between state and federal agencies, Ostrer reasonably believed that the state grant of transactional immunity also protected him from federal prosecution. No official made a clear representation to the contrary, and had anyone done so, Ostrer might well have

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chosen to remain silent and risk state contempt charges rather than risk the more awful consequences of federal prosecution. Since Ostrer relied on the conduct of state and federal officials in reaching his reasonable conclusions as to the scope of his immunity privilege, the Federal Government cannot deny him transactional immunity without abridging his Due Process rights. Cox v. Louisiana, 379 U.S. 559, 568-71 (1965); Raley v. Ohio, 360 U.S. 423 (1959).

Thus, in the peculiar facts in the case at bar, the question left open by the Supreme Court in Murphy, supra -- whether the Federal Government must extend transactional rather than use immunity to state transactionally immunized testimony -- must be resolved in favor of the broader transactional immunity. Certainly the Federal Government, which was in close touch with the very District Attorney's office that conducted the grand jury proceedings prior to the point that Ostrer testified, cannot now prosecute Ostrer for the very transactions about which he testified under a state grant of transactional immunity. Such hand-in-glove federal-state cooperation, for whatever advantages it has for both state and federal investigative and prosecutorial agencies, must also carry with it the obligation not to mislead the witness into misunderstanding the dangers in which he places himself by giving testimony. The situation is not different from that faced by the witness

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in Raley v. Ohio, supra, where the Supreme Court made it clear that prosecutorial authorities could not lead a witness down a primrose path and then prosecute him because of a legal judgment made by the witness on the basis of misleading non-information from the authorities.

In any event, even if this Court were to find that under the extraordinary circumstances of this case transactional immunity does not attach to Ostrer, then Murphy, supra, and Counselman v. Hitchcock, 142 U.S. 547 (1892), absolutely prohibit the federal government from using any evidence directly or indirectly derived from compelled state testimony against Ostrer in any criminal prosecution. In particular, the Government may not present immunized testimony or its fruits before a grand jury in order to secure an indictment. United States v. DeDiego, 511 F.2d 818 (D.C. Cir. 1975); United States v. Catalano, 491 F.2d 268 (2nd Cir. 1974), cert. denied 419 U.S. 825 (1974); United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); and United States v. Dornau, 359 F.Supp. 684 (S.D.N.Y. 1973), reversed on other grounds, 491 F.2d 473 (2nd Cir. 1974). Moreover, once a person shows that "he has testified under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed

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evidence." Murphy, supra, 378 U.S., at 79 n. 18. Since Ostrer's compelled financial disclosures before the New York grand jury are clearly potentially incriminating with respect to the threatened federal tax indictments, the "heavy burden" is now on the Government to prove that "all of the evidence it proposes to use [is] derived from legitimate independent sources." Kastigar v. United States, 406 U.S. 441, 461-2 (1972).

The Supreme Court has yet to clarify the meaning of this affirmative "heavy burden." In its most recent decision on the question, the Second Circuit declined to formulate a clearer standard and stated only the the Government's burden is "substantial." United States v. Goldberg, supra, 472 F.2d at 516. But regardless of what burden standard is used, the Government cannot discharge its burden in the instant case. The massive quantity of information divulged by Ostrer before the grand jury fills over 1600 transcript pages and is inextricably knotted with any evidence in the possession of the defendants through a complex interchange of information between federal and state authorities. The dimensions of this interchange are only hinted at in outline form in Ostrer's affidavit filed with the Complaint in this action. The mind boggles at the hopeless prospect of unravelling this tangled knot into a straight thread of evidence obtained from any claimed legitimate independent

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source. Since the Government cannot possibly meet its burden, the court should enjoin the defendants from using any evidence tainted by Ostrer's immunized testimony.

If the court disagrees with this conclusion, Ostrer, at the very least, is still entitled to a pre-indictment evidentiary hearing to determine the extent to which evidence in the hands of the defendants is tainted by immunized testimony. Federal use immunity "prohibits the prosecutorial authorities from using the compelled testimony in _any_ respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." _Kastigar_ v. _United States_, _supra_, 406 U.S. at 453. Indictment alone, however, inflicts penalties on a person. Speaking eloquently to this point, Frank, J., said:

> "For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal." _In Re Fried_, 161 F.2d 453, 458-9 (2nd Cir. 1947).

A grant of use immunity would not be coextensive with the Fifth Amendment privilege against self-incrimination, if immunized testimony could be used to inflict the penalty of an indictment. _See_ _United States_ v. _Goldberg_, _supra_, 472 F.2d at 516. Indeed, this reasoning has been pressed to its

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logical conclusion by the court in United States v. McDaniel, supra. In that case, the Eighth Circuit expressly prohibited "all [federal] prosecutorial use of [compelled state] testimony, not merely that [use] which results in the presentation of evidence before the jury." 482 F.2d, at 311.

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The Indictments Against Plaintiffs Should Be Enjoined as They Are Motivated by Improper Purposes, in Violation of Plaintiffs' Due Process Rights.

The Organized Crime Strike Force is improperly threatening the plaintiffs with tax evasion indictments to place maximum, indeed extortionate, pressure on Louis Ostrer to give testimony, either true or false, leading to the conviction of alleged "organized crime figures" with whom he is believed to have had "associated". On June 11, 1976, plaintiffs' attorneys attended a meeting at the offices of the Strike Force to discuss the threatened indictments. At this meeting, the Strike Force indicated that it would be willing to drop the entire investigation, if and only if, Ostrer agreed to cooperate fully. Hence the primary motive for the investigation is not to secure tax convictions, but rather is to force Ostrer into talking. In effect, the Strike Force is holding Ostrer's family as "hostages" until he "ransoms" them with his testimony.

By following this fundamentally unfair course of conduct, the Strike Force has violated the Due Process rights of plaintiffs under the United States Constitution, and committed, or at the very least, attempted to commit, the crime of coercion under New York State law. In addition, any attorney who has threatened to bring indictments in order to coerce Louis Ostrer into testifying has breached his ethical obligation as an officer of this court by violating the Code of

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Professional Responsibility of the American Bar Association [hereinafter referred to as "ABA Code"].

By threatening Louis Ostrer and his family with tax indictments, and by offering the cooperation deal, the government has placed Ostrer in a double bind: If he cooperates and talks, he may forfeit his Fifth Amendment privilege against self-incrimination; if he refuses to talk, he and his family will be indicted on tax offenses. This bind violates Ostrer's Due Process rights on the principles established in Garrity v. New Jersey, 385 U.S. 493 (1967).

In Garrity, during a state corruption investigation, police officers were faced with a choice of remaining silent and risking the loss of their jobs, or of testifying and risking self-incrimination. The officers decided to talk and were ultimately convicted on the basis of their testimony. The choice imposed upon the officers was aptly described by the Court as a choice between the "rock" and the "whirlpool" "which made the statements products of coercion in violation of the Fourteenth Amendment." Id., at 496. Since the Court held that a state cannot condition the exercise of the Fifth Amendment privilege against self-incrimination upon a threat of removal from office, it follows, a fortiori, that the Government cannot be allowed to condition Ostrer's right to invoke his privilege against self-incrimination upon the more serious threat of criminal indictments against himself and his

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family.

More recently, the Court sounded a similar chord in Blackledge v. Perry, 417 U.S. 21 (1974). The defendant in that case received a misdemeanor conviction from a lower state court system which had exclusive initial trial jurisdiction over all misdemeanor prosecutions. After conviction, the defendant exercised his statutory right to an automatic trial de novo in a higher state court of more general jurisdiction. Before the new trial began, the state prosecutor secured a felony indictment against the defendant on the basis of the same conduct which resulted in the original misdemeanor conviction. The Court held that the prosecutor's new charge violated the defendant's Constitutional Due Process rights by deterring the defendant's exercise of a statutory right to a new trial free of the "apprehension that the state will retaliate by substituting a more serious charge for the original one." Id., at 28. Cf. Lawrence v. Henderson, 318 F.Supp. 230 (E.D.La. 1970). The potential for prosecutorial vindictiveness in this situation formed the primary rationale for this holding; an actual retaliatory motive on the part of the prosecutor is not necessary to invoke the protection of Due Process.

United States v. DeMarco, 401 F.Supp. 505 (C.D.Ca. 1975) followed the reasoning of Blackledge by holding that Due Process made it impermissible for the Government to threaten to bring

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additional charges against a defendant if he successfully exercised his statutory right to a change of venue. To protect the defendant from this abusive practice, the court dismissed the extra charges which the government brought after venue was successfully changed. The court, here as in Blackledge, fully appreciated that the retaliatory indictments were well founded in fact, but dismissed them anyway because of the overriding importance of preventing indictments from being brought on the basis of improper prosecutorial motives.

If a person's Due Process rights are violated when the government threatens indictments to deter his exercise of a statutory right, even greater violence is done to Due Process when the threats are applied to deter the exercise of a constitutional right. This, though, is precisely what the government is doing to the Ostrers. The government has repeatedly attempted to solicit Ostrer's cooperation and testimony. Ostrer has been and continues to remain silent, as is his right under the Fifth Amendment. Failing in their efforts, the Government has retaliated by threatening tax indictments against Ostrer and his family.

The conduct of the current tax investigation is suspect not only on Due Process grounds, but is also suspect on criminal grounds. New York Penal Law §135.60 defines coercion in the second degree, a class A misdemeanor, as follows:

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> A person is guilty of coercion in the second degree when he compels or induces a person to engage in conduct which the latter has a legal right to refrain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in the victim a fear that, if the demand is not complied with, the actor or another will:
> ...
> (4) Accuse some person of a crime or cause criminal charges to be instituted against him.

A New York State Court applied the more delimited predecessor to this coercion statute to police conduct in a case with facts closely analogous to the instant action. In People v. Logan, 241 N.Y.S.2d 344 (Sup.Ct., Queens Cty. 1963), the police came to defendant's apartment to arrest him for supplying a gun to armed burglars and to question him about another gun that the burglars said he had in his possession. At that time they threatened to arrest his mother, his brother, and all other occupants of the apartment unless Logan admitted and disclosed the whereabouts of a gun unrelated to the subject of the original arrest. Logan was subsequently indicted on his gun admissions, but the court refused to admit his confession because the police action "brought them to, if not over the brink of criminal coercion." Id., at 350. The Strike Force has, at the very least, attempted as much coercion as the police officers committed in Logan. Tax charges are being brought against the plaintiffs not out of any desire to seek convictions or restitution for delinquencies, but rather are

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being brought primarily to coerce Louis Ostrer into talking.

Other courts have not hesitated to censure the use of criminal tactics by the State in securing indictments. Faced with a situation where a California state prosecutor brought criminal proceedings and secured a conviction against a defendant in order to prevent the defendant from civilly suing the arresting police officers, the Ninth Circuit Court of Appeals granted habeas relief because the prosecutor's conduct amounted to extortion under the California Criminal Code and to a violation of §DR 7-105 of the ABA Code which prohibits the misuse of criminal process by an attorney to gain advantage in a civil matter. McDonald v. Musick, 425 F.2d 373 (9th Cir. 1970).

Apart from the legal improprieties of the threatened indictments, the Court must also face the serious ethical questions which attend the conduct of any government attorney who has participated in the scheme to extort testimony from Louis Ostrer. The ABA Code, adopted by the New York Bar in 1970, provides in §EC 7-14 that: "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair." The unfairness of the present investigation speaks for itself. The threatened indictments of his family, in particular of his 79 year old father Jack and his son Benjamin, a candidate for the New York Bar, place unconscionable pressure on Ostrer to relent and testify. Furthermore, these indictments, if brought, will subject his family to the humiliation, ignominy, and shame of a public accusation of criminality solely because they are unfortunate enough to be related to a man who is reputed to have "knowledge" about the "underworld".

Federal courts have long understood the potential dangers of the criminal process in the hands of an overzealous prosecutor and have invoked their inherent supervisory power over grand juries, officers of the court, and their own proceedings in an effort to create civilized standards of criminal justice and to minimize abuse. *See In Re Grand Jury Proceedings*, 507 F.2d 963 (3d Cir. 1975); *Nixon v. Sirica*, 487 F.2d 700 (D.C.Cir. 1973); *United States v. Thomas*, 320 F.Supp. 527 (D.D.C. 1970); *Fay v. New York*, 332 U.S. 261 (1947); *McNabb v. United States*, 318 U.S. 332 (1943); and *United States v. Maresca*, 266 F. 713 (S.D.N.Y. 1920).

In the case at bar, in order to protect the sanctity of governmental processes, and to deter future instances of blatant prosecutorial misconduct, this court should exercise its supervisory power to grant Ostrer and his family full immunity from prosecutions on all crimes for which the Strike Force has threatened to secure indictments. The District of Columbia Circuit granted similar broad relief in *Dixon v. District of Columbia*, 394 F.2d 966 (D.C.Cir. 1968), where the prosecutor's conduct was even less egregious than in this case.

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There, the defendant and the D.C. prosecutor agreed that the prosecutor would not press traffic charges if the defendant agreed not to exercise his right to file formal complaints against the arresting officers. Later the defendant reneged and filed the complaints. The prosecutor retaliated by filing the charges that had been previously dropped. Using its supervisory powers, the D.C. Circuit immunized Dixon from future prosecution on the disputed charges.

Even if the Court believes such relief to be inappropriate, the court can still invoke its power pursuant to F.R.Cr.P. 6(g) to discharge the grand jury investigating the plaintiffs in order to prevent indictments from being secured on the basis of improper prosecutorial motives and methods. See Nixon v. Sirica, supra at 790; United States v. Smyth, 191 F.Supp. 283, 292 (N.D.Cal. 1952).

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Defendants Should Be Enjoined From Harassment of Plaintiffs in Their Business Affairs and Personal Lives in Violation of Their Fourth and Fifth Amendment Rights.

These prospective indictments with which plaintiffs find themselves threatened represent only the most recent of a long series of vindictive and abusive actions brought by the government against plaintiffs. The Ostrer family, in particular Louis C. Ostrer, has been the target of sustained harassment by government agencies at all levels for the past several years. Louis Ostrer has had his telephone illegally tapped and his offices bugged, his business disrupted by repeated examination and subpoena of the same records, his friends and business associates and customers pestered and threatened and his name smeared in the media by unproven rumors and allegations based on leaks from government agencies.

The effect of this sustained campaign, or conspiracy, against Louis Ostrer has been disastrous. It has made it impossible for him to conduct his business in an orderly fashion. He has lost millions of dollars in accounts from clients who simply do not wish to pay the price of becoming the targets of similar scrutiny and harassment by virtue of their association with him. He has suffered the embarrassment of having friends and associates avoid his company out of fear that their own lives may be in danger when they are near him, a fear which has its origins in the stories and

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rumors that he is the target of gang-land murder, which have been leaked by government officials to the media and spread by word of mouth.

The government has not been shy about the reasons for its intense interest in Louis Ostrer and his family. Time and again in its communications with him and his associates, in its briefings of the media and in the reports of legislative investigations it has emphasized its belief that he is closely associated with labor racketeers and organized crime. Its accusations against him have focussed not so much on what he is suspected of doing but on what and whom he is suspected of knowing.

It is because the government suspects the Ostrers of committing acts which are not crimes and committing crimes which it cannot prove that its agents have resorted to tactics of sustained harassment in the hope of somehow finding out something or of making someone relent and cooperate.

The simple fact is that it is not criminal to know or associate with anyone, no matter how blameworthy or criminal the activities of these people might be. The government may not prosecute and convict people for their associations or even for what it suspects is involved in those associations. In United States v. Bufalino, 285 F.2d 408 (2nd Cir. 1960) the Court of Appeals of this Circuit dismissed convictions which emerged out of the Apalachin gathering at the home of Joseph

Barbara, Sr. The indictments were essentially based on the suspicion that such a gathering had to be a criminal conspiracy of some sort. As the Court stated, such suspicions are insufficient to justify criminal convictions, as it is not a crime for even "bad" people to congregate or associate. As the Court said:

> Doubtless many of Barbara's visitors are bad people, and it is surely a matter of public concern that more is not known of their activities. But bad as many of these alleged conspirators may be, their convictions for a crime which the government could not prove, on inferences no more valid than others equally supported by reason and experience and on evidence which a jury could not properly assess, cannot be permitted to stand.

Id., at 419

In a real sense, the nightmarish quality of the situation in which the Ostrer family finds itself is caused by the fact that what the government suspects it of is not a crime. When a person is accused by the state of committing a crime he is accorded certain basic protections which govern how the state may proceed in proving that accusation against him. Perhaps his most basic right is that he can require the state either to bring him to trial speedily and prove its case, or to drop the accusation and leave him in peace. Strunk v. United States, 412 U.S. 434 (1973). If it fails at trial to prove its case he is safe from the anxiety of further trial or even accusation for the same offense. Green v. United States, 355 U.S. 184 (1957). However, if the accu-

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sation is merely that he associates with undesirable people and knows incriminating things about them, it is extremely difficult ever to disprove these suspicions. After all, how does one demonstrate that he does not know what the government believes he does know? It is also difficult for one so accused to find a mechanism by which he can force the government either to prove that its suspicions are founded, or to leave him alone.

There is little question that this pattern of harassment is fundamentally unfair and has resulted in violation of the Ostrers' rights to privacy and Due Process. The government clearly violates the Fourth and Fifth Amendments when it maintains a sustained surveillance and investigation of an individual and his family without probable cause to believe they have committed a crime. Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964). The harassment of friends and business associates and warnings to them that they are better off not dealing with Ostrer would be clear violations (if engaged in by a private individual) of the Sherman Antitrust Act's prohibitions against conspiracy to boycott or drive someone out of business. See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). The repeated subpoenas of his records and investigations of the same business activities and transactions constitute harassment in violation of the Due Process Clause. In United States v. American

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Honda Motor Company, 271 F.Supp. 979 (N.D.Cal. 1967), the court dismissed the indictments as defendant had been subject to multiple subpoenas from different grand juries for the same records and documents and then indicted by each for separate parts of the same transaction. The court found that "successive grand jury inquiries and indictments for alleged separate conspiracies arising out of the same transaction" was harassment in violation of the Due Process Clause. Having had his papers and records seized in an illegal search, subpoenaed by a state grand jury and other investigatory agencies, Louis Ostrer now faces two more subpoenas for the very same records and papers from grand juries sitting simultaneously in New York and Detroit. This surely is no less a violation of Due Process.

This interference by means of direct and indirect means of harassment with the plaintiff Ostrer's ability to earn a living also violates his interest in liberty as protected by the Due Process Clause of the Fifth Amendment. It has been recognized by courts in many contexts that an individual's interest in protecting his ability to "follow a chosen profession" is a "substantial and legally cognizable interest entitled to constitutional protection against official governmental action that debases [it]." United States v. Briggs, 514 F.2d 794, 797, 798 (5th Cir. 1975). Also see Greene v. McElroy, 360 U.S. 474 (1959) (recognizing that the Constitution

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protects against unreasonable governmental interference with a person's ability to pursue his profession).

It is at this preliminary stage of police and prosecutorial activity, i.e., investigation and surveillance, that judicial controls to ensure fair treatment are most needed. In United States v. Bryant, 439 F.2d 642, 644 (D.C. Cir. 1971), Judge J. Skelly Wright pointed to this problem as

> an anomaly of our criminal process: controlled by rules of law protecting adversary rights and procedures at some stages, the process at other stages is thoroughly unstructured. Besides the carefully safeguarded fairness of the courtroom is a dark no-man's-land of unreviewed bureaucratic and discretionary decision making.

It is clear as well that such controls are most difficult to impose at this stage. As Chief Justice Warren wrote in Terry v. Ohio, 392 U.S. 1, 14 (1968), regarding the utility of the exclusionary rule as a method of judicial control,

> Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

However, despite the difficulties inherent in exercising judicial control in such circumstances, when a court finds that the police or other investigatory agencies are engaging in such harassing tactics it should invoke its injunctive remedies. In Giancana v. Johnson, supra, the court enjoined

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the FBI from maintaining constant surveillance and observation of the plaintiff and his family where those measures were intended to harass. In Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966), the court enjoined the police from engaging in searches absent probable cause where there was evidence of conspiracy within the police department to harass an entire community by means of such searches. Similarly in this case the only appropriate remedy is for the court to order defendants to cease their participation in the unconstitutional tactics of harassment of plaintiffs in their business affairs and personal lives.

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Defendants Should Be Enjoined From Indicting Plaintiffs Because They Have Improperly Obtained Access To A Privileged Work Product Of Plaintiffs' Attorneys.

Responding to the Strike Force's investigation of and threatened indictments against Plaintiffs, Plaintiffs' counsel have prepared memoranda, notes, and other legal materials in anticipation of potential criminal and civil litigation. On July 14, 1976, Alan Dershowitz, Esquire, counsel for one of the plaintiffs herein, entrusted copies of some of these confidential documents to Nancy Rosner, Esquire, with the aim of protecting and furthering the interests of all the plaintiffs and on the condition that she would keep them confidential. One of these documents was a preliminary draft of an affidavit of Louis Ostrer that discussed certain events and indicated the possibility of civil litigation by Ostrer. Without authorization from any of the plaintiffs, Defendant Naftalis, Strike Force prosecutor in charge of the Ostrer investigation, gained possession of this draft affidavit from Rosner's papers, read it apparently from cover to cover, and then delivered the draft to Defendant Aronwald, who also read it.

Mr. Aronwald's and Mr. Naftalis' actions have violated plaintiffs' rights under the work product doctrine and their right to effective assistance of counsel guaranteed by the Sixth Amendment.

The Supreme Court has long recognized "the general policy against invading the privacy of an attorney's course of preparation" through pre-trial discovery in civil litigation. Hickman v. Taylor, 329 U.S. 495, 512 (1947). If an attorney's thoughts were not inviolate, "[i]nefficiency, unfairness, and sharp practices would inevitably develop... in the preparation of cases for trial." Id. at 511. These same considerations are even more pressing where, as here, the attorney's preparations are made in anticipation of criminal charges. See United States v. Nobles, 422 U.S. 225 95 S.Ct. 2160, 2169-71 (1975). Not long ago this District presaged Nobles by acknowledging in In Re Turkeltoub, 256 F.Supp. 683 (S.D.N.Y. 1966) the importance of maintaining a pre-trial shroud of confidentiality around the work product of a criminal defendant's counsel. In that case, the Court held that an attorney for a potential criminal defendant could not be compelled to testify before a grand jury seeking that defendant's indictment where the testimony would breach the secrecy of the attorney's defense preparations.

In the case at bar, the protective shroud around the work of plaintiffs' attorney has been ripped away by the Strike Force's unauthorized access to Ostrer's affidavit. The mental impressions, conclusions, opinions, and legal theories of plaintiffs' attorneys incorporated in the draft affidavit have been exposed. Moreover, they will remain exposed, as Messrs. Naftalis and Aronwald freely admit that

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they cannot erase from their minds the contents of the affidavit. Given this open-ended opportunity for prosecutorial pre-trial use, any indictment the Strike Force now seeks will be corrupted by the illegitimate pre-trial "discovery". Since suppression of use in the spirit of Turkeltoub is impossible; the only appropriate remedy is to enjoin the defendants from indicting the plaintiffs.

To refuse plaintiffs' claim for relief in this action would also offend the Sixth Amendment right to effective assistance of counsel by condoning intrusions into the councils of the defense.

In cases presenting the issue of Government intrusion into the confidential attorney-client relationship before this Circuit, a two-tiered analytical approach has been used to determine whether such intrusions rise to the level of Sixth Amendment violations. See United States v. Gartner, 518 F.2d 633 (2nd Cir. 1975), cert denied, __U.S.__, 96 S.Ct. 222 (1975); and United States v. Rosner, 485 F.2d 1213 (2nd Cir. 1973), cert. denied, 417 U.S. 950 (1974). Where the Government's intrusion is "manifestly and avowedly corrupt," this Circuit has adopted a per se rule of granting relief without requiring the aggrieved to show prejudice. For intrusions falling short of the grossest kind, the court requires a showing of prejudice to determine whether the prejudice is substantial enough to warrant a remedy of dismissal in the case of an indictment, or of reversal in case of a conviction.* Applying this approach to any interpretation of the Government's conduct, the Court must conclude that plaintiffs' Sixth Amendment rights have been violated and that the defendants should be enjoined from indicting the plaintiffs as threatened.

If Defendant Naftalis intentionally appropriated the draft affidavit, this Court must apply the *per se* rule to punish the Government for morally and ethically reprehensible -- indeed, possibly criminal -- conduct and to deter further instances of blatant misconduct. *Rosner*, *supra* is clear on reserving this Court's power in meting out such such sanctions in circumstances that warrant it. 485 F.2d at 1228.

If Naftalis "accidently" acquired the draft affidavit, but then read any significant portion of it, the *per se* rule is still applicable. Any reasonable man would recognize immediately from the content of the first few pages of the draft that it was a privileged work product of

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*Other courts do not seem to be as wedded to the two-tiered scrutiny adopted by the courts of this Circuit. Where the claim of intrusion has been raised at a post-conviction stage, some courts have granted new trials without requiring a showing of prejudice on the part of the defendants. *Caldwell* v. *United States*, 205 F.2d 879 (D.C. Cir 1953), *cert. denied*, 349 U.S. 930 (1955); *Coplon* v. *United States*, 191 F.2d 749 (D.C.Cir 1951), *cert denied* 342 U.S. 926 (1952). This Circuit's more niggardly approach is probably in violation of the standard set by the Supreme Court. *See Geders* v. *United States*, __U.S.__, 96 S.Ct. 1330 (1976); *O'Brien* v. *United States*, 386 U.S. 345 (1967); and *Black* v. *United States*, 385 U.S. 26 (1966).

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plaintiffs' attorneys developed from long interviews with Louis Ostrer, protected by the attorney-client privilege. Once Naftalis and Aronwald realized that the draft was prepared for potential litigation or defense, they should have immediately stopped reading the document and have arranged for its prompt return. Instead, they apparently went on and read the entire (approximately 20 page) document. One can only assume that the purpose of such a complete reading was to glean any and all details of plaintiffs' legal theories incorporated in the document. Such a purpose would, of course, be consistent with the history of questionable tactics used by the Strike Force to place maximum pressure on Louis Ostrer to talk. It belabors the obvious to say that such a reading could not have been accidental.

Even if this court finds that members of the Strike Force have not engaged in intrusive conduct of the degree warranting the application of the per se rule, plaintiffs have been so massively prejudiced as to require relief on the other prong of the Second Circuit test. The prejudice to plaintiffs' legal preparation from the Strike Forces' unauthorized access to the draft affidavit is palpable, continuing, and irremediable. In this connection, two factors bear consideration.

First, any Strike Force prosecution based on the threatened indictments against plaintiffs will now be launched with knowledge of rebutting defense legal theories incorporated in the draft affidavit. As a consequence, any prosecution will be tailored to meet and to thwart the theories incorporated in the draft affidavit.

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Second, in retaliation for plaintiffs' wholly legitimate preparations for potential litigation, Defendant Aronwald has broken off all further negotiations with the plaintiffs in connection with the investigation. In effect, the Strike Force has foreclosed any option to the plaintiffs to cooperate with the investigation in the future.

In light of all of these factors, if the Court should find the *per se* rule inappropriate to the case at bar, the Court, nevertheless, must quite clearly afford plaintiffs the opportunity to establish prejudice at a hearing.

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Remedies

Plaintiffs ask the court to enjoin the defendants (on a preliminary basis until permanent relief can be obtained at a hearing on the merits) from pursuing a course of action intended to lead to plaintiffs' indictment. First, they seek to have defendants enjoined from presenting any further evidence to a grand jury in violation of plaintiffs' constitutional and statutorily protected rights and to have that evidence suppressed from use in any future judicial proceeding. Second, they seek to prevent defendants from bringing indictments against plaintiffs as threatened either by enjoining defendants from recommending indictment to a grand jury, by discharging the grand jury which has been abusively used or by immunizing plaintiffs with respect to the alleged crimes. Finally, they seek to have this court order the defendants to cease and desist from unlawful harassment of and interference with the plaintiffs and their lawful activities and associations.

Pre-indictment injunctive relief is particularly appropriate in this case for a number of reasons. Plaintiffs can allege with some certainty that indictment is imminent. The grounds upon which those indictments would be subject to dismissal are readily apparent at this stage, namely that such indictments would be based wholly on evidence inadmissible before a grand jury and that they would be the product of

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improper prosecutorial motives. Plaintiffs allege that if relief were postponed until after the indictments were returned they would suffer irreparable harm. As the Court of Appeals of this Circuit stated in In Re Fried, 161 F.2d 453, 458 (2nd Cir.1947), "...a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted." Considerations of judicial economy as well as fairness to plaintiffs dictate, therefore, that their claims be adjudicated now prior to indictment. As the court stated in United States v. DeMarco, 401 F.Supp. 505, 514 (C.D.Cal. 1975), "If a defendant can appropriately resist prosecution at trial on the ground that the prosecution has launched an indictment for unjustifiable purposes, it makes sense to permit the grand jury to prevent the indictment from being filed in the first place."

Finally, this court has ample authority under its inherent supervisory powers over officers of the court, grand juries, and over the conduct of its own proceedings to grant the requested relief. A court should order pre-indictment suppression hearings in a case like the present when indictment is imminent and the grounds for suppression are clear. As the Court of Appeals stated in Hunsucker v. Phinney, 497 F.2d 29, 32 (5th Cir.1974), "A substantial body of precedent establishes that federal district courts have power to order the suppression or return of unlawfully seized property even

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though no indictment has been returned and thus no criminal prosecution is yet in existence."

It is also well-established that the court can enjoin government attorneys from abusively exercising their prosecutorial powers. As the Supreme Court stated in Go-Bart Importing Co. v. United States, 282 U.S. 344, 355 (1931),

> The United States attorney, as the officer authorized to conduct a prosecution before this Court is, in respect to the acts relating to the prosecution, subject to the proper exertion of the disciplinary powers of the court.

In particular, "an equity suit to enjoin specific abuses" may be brought against the United States attorney. In Re Grand Jury Subpoena to Central States, 225 F.Supp. 923, 925 (N.D.Ill. 1964). See also United States v. Thomas, 320 F. Supp. 527 (D.D.C. 1970).

As regards grand juries, the classical statement concerning the scope of a court's power over a grand jury appears in In Re National Window Glass Workers, 287 F. 219 (N.D.Ohio 1922). There the court said:

> A grand jury has no existence aside from the court which calls it into existence and upon which it is attending. A grand jury does not become, after it is summoned, impaneled, and sworn, an independent planet, as it were, in the judicial system, but still remains an appendage of the court on which it is attending.
>
> Id., at 225.

Consequently, as the Court of Appeals of the District of

Columbia recently concluded, the court which empanels a grand jury has "broad discretion to discharge it for any reason." Nixon v. Sirica, 487 F.2d 700, 790 (D.C.Cir. 1973). Discharge of the grand jury is also within the statutorily granted powers of court under F.R.Cr.P. 6(g). The court's discretionary power may even be exercised to prevent an indictment from being returned. United States v. Smyth, 104 F.Supp. 283, 292 (N.D.Cal. 1952).

Conclusion.

For all of the above stated reasons the court should grant the requested preliminary relief in this action.

Respectfully,

LOUIS C. OSTRER

By his Attorney,

Alan M. Dershoiwtz
Faculty Office Building
Harvard Law School
Cambridge, Massachusetts 02138
(617) 495-4617

RITA OSTRER,

By her Attorney,

Harvey a Silverglate

Harvey A. Silverglate
Silverglate, Shapiro & Gertner
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JACK OSTRER,

By his Attorney,

Jeffrey M. Atlas
Wynn & Atlas
230 Park Avenue
New York, New York 10017
(212) OR9-9429

83

DINA GELMAN,

By her Attorney

Richard H. Wynn
Wynn & Atlas
230 Park Avenue
New York, New York 10017
(212) OR9-9429

On the Brief:

Norman Moscowitz
Alan Dean

84

APPENDIX TO MEMORANDUM OF LAW

Copy of inventory (partial) of papers taken and return by IRS

Form 2725 (Rev. Dec. 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

85

1. DOCUMENTS SUBMITTED IN RE: [illegible] and Associates Corporation

2. DISTRICT: Manhattan

3. DATE:

4. SUBMITTED BY: [illegible]

5. PLACE OF SUBMISSION: District Attorney's Office - 155 Leonard St. N.Y.C.

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

Re: [illegible] Agency Inc. 38[illegible] 5th Avenue, New York, N.Y.

1 Book containing - General Ledger, Cash Receipts, and Disbursements July [illegible] through January [illegible]

6 Books Check #1-655 [illegible]

[illegible] Envelopes Bank Statements & Cancelled checks, 1 Batch assorted deposit slips 11-30-70 through [illegible]

Republic National Bank of N.Y. Acct # 101-677-6

[illegible] Envelopes Bank Statements & Cancelled checks Jan, [illegible] through June, [illegible] [illegible] Bank [illegible], N.Y. Account 1935-772-3

[illegible] Envelopes Bank Statements & cancelled checks July 70 through Jan. 73 National Bank of North America, N.Y. Acct. # 1935-772-3

Envelope miscellaneous deposit slips [illegible]

2 Batches assorted deposit slips, cancelled checks, photocopies of cancelled checks & miscellaneous bank memos

1 Envelope assorted expense vouchers

1 Folder photo copies of various bank statements

NO. CONTINUATION SHEETS ATTACHED:

RECEIVED BY: Edward I. Martin

TITLE: [illegible] Agent

ACCOMPANIED BY: [illegible]

ADDRESS: 120 Church St[illegible]

PHONE NO.: [illegible]

TITLE:

The above documents were returned to me as indicated at right → 7/15/74 | 120 Church St. | Edward I. Martin R/A

SIGNATURE OF: William J. Kiley - atty. in fact.

Form 2725 (Part 2) (Rev. 12-70)

Form [illegible]
(Rev. [illegible] 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

8

1. DOCUMENTS SUBMITTED IN RE: [illegible] and [illegible] Corporation

2. DISTRICT: Brooklyn

3. DATE: [illegible]

4. SUBMITTED BY: District Attorney N.Y. County

5. PLACE OF SUBMISSION: [illegible]

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

1 Envelope Miscellaneous Stock Transaction Slips For various individuals and corporations

1 Batch assorted cancelled checks, deposit slips and bank memos

NO. CONTINUATION SHEETS ATTACHED

7A. RECEIVED BY (Signature): Edward J. Martin

7B. TITLE: Revenue Agent

7C. ADDRESS: [illegible]

7D. PHONE NO.: [illegible]

8A. ACCOMPANIED BY (Signature): [illegible]

8B. TITLE

9. [illegible]

The above documents were returned to me as indicated at right.

10A. [illegible]: 120 Church St.

10B. [illegible]: 1/15/74 Edward J. Martin R/A

11. SIGNATURE [illegible]: William J. Kiley - atty in fact

(2)

COPY

FORM 2725 (Part 2) (REV. 12-[illegible])

FORM 2725
REV. [illegible] 1970

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

87

1. DOCUMENTS SUBMITTED IN RE

[illegible] AND ASSOCIATED CORPORATIONS

2. [illegible]

3. DATE
1-14-74

4. SUBMITTED BY
MANHATTAN DISTRICT ATTORNEY [illegible] N.Y. COUNTY

5. PLACE OF SUBMISSION
DISTRICT ATTORNEY'S OFFICE 155 LEONARD ST. N.Y.C

6. ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

INTERNATIONAL FASHIONS.

Cancelled checks & bank statements [illegible] National Bank for 6/30/69, 7/30/69 to 7/31/70 inclusive

10. CONTINUATION SHEETS ATTACHED

7. RECEIVED BY (Signature)
[illegible]

7A. ADDRESS
120 CHURCH ST, N.Y.C

TITLE
REVENUE AGENT

7B. PHONE NO.
[illegible]

8. ACCOMPANIED BY (Signature)
[illegible]

8A. TITLE
[illegible]

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right.

9A. DATE RETURNED
1/15/74

[illegible] 120 Church St

[illegible] RETURN OF DOCUMENTS
Edward J. Martin R/A

SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy - atty - in fact

FORM 2725 (Part 2) (REV. [illegible])

9

FORM 2725
(REV. [illegible])

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

88

1. DOCUMENTS SUBMITTED IN RE:

[illegible] OFFICER AND ASSOCIATED CORPORATIONS

2. DISTRICT

MANHATTAN

3. DATE [illegible]

4. SUBMITTED BY

DISTRICT ATTORNEY [illegible] NY COUNTY

5. PLACE OF SUBMISSION

DISTRICT ATTORNEY'S OFFICE, 155 LEONARD ST, N.Y.C.

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

EUROPA FASHIONS LTD

Cancelled checks & bank [illegible] National Bank for 5/21/70, 6/30/70, 7/30/70 to 11/30/70 [illegible]

NO. CONTINUATION SHEETS ATTACHED

7a. [illegible] BY (Signature)

[illegible]

7b. ADDRESS

[illegible]

7c. [illegible]

[illegible]

7d. PHONE NO.

[illegible]

8a. [illegible] BY (Signature)

[illegible]

8b. TITLE

[illegible]

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right. ---->

10a. DATE RETURNED

1/15/74

10b. [illegible]

170 Church St

10c. [illegible] DOCUMENTS

Edward J. Martin R/A

11. SIGNATURE [illegible] DOCUMENTS [illegible] RETURNED

William J. Kilroy - atty in fact.

COPY

Form 2725 (Part 2) (Rev. [illegible])

FORM 2725
REV. DEC. 19[illegible]

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

89

1. DOCUMENTS SUBMITTED IN RE:
LOUIS C. OSTER AND ASSOCIATED CORPORATIONS.

2. DISTRICT
MANHATTAN

3. DATE
1-15-74

4. SUBMITTED BY
DISTRICT ATTORNEY,
NEW YORK COUNTY

5. PLACE OF SUBMISSION
155 LEONARD ST, NY C.

6. ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

Envelope - bank statements & cancelled checks
Aug 71 - April 1972. City [illegible] Bank, N.J.
Acct 41-23041-8 [illegible] cancelled checks for 1972
Name: Madison Agency Inc.
299 [illegible] Ave, Jersey City, N.J.
13 envelopes bank statements & cancelled checks Jan.
'70 to July 1971.
1 batch miscellaneous bank advices.
National Bank of North America Acct #1652-475-0
Name Madison Agency Inc.
Miscellaneous cancelled checks of Madison Agency Inc
1970 & 1971 on Trade Bank & Trust Co, Underwriters
Bank and Kings [illegible] the Bank

NO. CONTINUATION SHEETS ATTACHED

7. RECEIVED BY (Signature)
[illegible]

7A. ADDRESS
[illegible] LEONARD ST, NYC

TITLE
[illegible]

7B. PHONE NO.
[illegible]

ACCOMPANIED BY (Signature)
[illegible]

8A. TITLE
[illegible]

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at left

10A. DATE RETURNED
1/15/74

10B. PLACE
120 Church St

Edward J. Martin R/A

SIGNATURE OF RE[illegible] DOCUMENTS WERE RETURNED
William J. Riley Atty in fact.

FORM 2725 (Part 2) (REV. 12-[illegible]

FORM [illegible]
(REV. DEC. 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

90

1. DOCUMENTS SUBMITTED IN RE:
[illegible] and Associated Companies

2. DISTRICT
Manhattan

3. DATE
[illegible]-12-74

4. SUBMITTED BY
DISTRICT ATTORNEY [illegible] N.Y. County

5. PLACE OF SUBMISSION
District Attorney's Office 155 Leonard St. N.Y.C.

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

15 Envelopes cancelled checks & bank statements 1972
2 Boxes assorted cancelled checks, bank statements
and miscellaneous

Bank of Commerce - New York account # [illegible]
name of:
Dina Golman Agency
277 5th Avenue
New York, N.Y. 10016

15 Envelopes cancelled checks & bank statements 19[illegible]-72
2 Batches assorted check books, deposit slips, bank
statements & miscellaneous

Chemical Bank New York account # [illegible]
name of: Mrs. Dina Golman
10[illegible]-60 Queens Blvd
Forest Hills, N.Y. 11375

NO. CONTINUATION SHEETS ATTACHED

7a. RECEIVED BY (Signature)
[illegible]

7b. ADDRESS
[illegible] Church St. [illegible]

7c. TITLE
[illegible]

7d. PHONE NO.
[illegible]

8a. ACCOMPANIED BY (Signature)
[illegible]

8b. TITLE

9. Acknowledgment of return of documents

10. The above documents were returned to me as indicated at right →

10a. DATE RETURNED
7/15/74

10b. PLACE
120 Church St.

10c.
Edward J. Martin R/A

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy atty in fact

FORM 2725 (Part 2) (REV. 12-[illegible])

9

FORM [illegible]
REV. [illegible]

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

1. DOCUMENTS SUBMITTED IN RE:

[illegible] C. [illegible] and Associated Companies

91

2. DISTRICT: Manhattan

3. DATE: 4 - [illegible] - 74

4. SUBMITTED BY: DISTRICT ATTORNEY [illegible] N.Y. COUNTY.

5. PLACE OF SUBMISSION: District Attorney's Office 155 Leonard St., NYC

6. ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

4 Bank Statements & cancelled checks: Jan, Feb, Apr, May 1971
1 Envelope assorted deposit slips 1970-71
1 Box assorted cancelled checks, bank statements and miscellaneous

Underwriters Trust Company, New York acct # 3306267

Name of: Sutton Agency, Inc
284 Fifth Avenue
New York, N.Y. 10016

NO. CONTINUATION SHEETS ATTACHED

7. RECEIVED BY (Signature): [illegible] Martin

7A. TITLE: Revenue Agent

7C. ADDRESS: 120 Church St. NYC

7B. PHONE NO.: 264-30[illegible]

8. ACCOMPANIED BY (Signature): [illegible]

8A. TITLE: [illegible]

9. Acknowledgment of return of above documents

The above documents were returned to me as indicated at right

10A. DATE RETURNED: 1/15/74

10B. PLACE AT WHICH RETURNED: 120 Church St.

10C. NAME OF [illegible] RETURNING DOCUMENTS: Edward J. Martin R/A

SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED: William J. Kilroy - atty in fact.

COPY

FORM 2725 (Part 2) (REV. 12-7[illegible])

9

FORM [illegible]
(REV. [illegible])

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

1. DOCUMENTS SUBMITTED IN RE:
[illegible] and Associated Corporations 92

2. DISTRICT
Manhattan

3. DATE
4-16-74

SUBMITTED BY
District Attorney N.Y. County

5. PLACE OF SUBMISSION
District Attorney's Office 155 Leonard St. N.Y.C.

I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

6 Envelopes bank statements & cancelled checks Jan. '70 – June '70
Mfrs Bank & Trust, N.Y.C. Acct # 1632-479-0
Name: Modern Agency, Inc.
375 Sylvan Avenue Rt 9W
Englewood Cliffs, N.J. 07632

3 Envelopes bank statements & cancelled checks Jan & Feb. 1971
Kings Lafayette Bank, Brooklyn acct # 030061557
Name: Mclean Agency, Inc.
c/o Seymour Greenfield
366 Fifth Ave., N.Y. 10001

5 Envelopes Bank Statements & cancelled checks May '71 – Sept '71
Underwriters Bank & Trust Company, N.Y. Acct # 3306777
Name: Modern Agency, Inc.
299 Pavonia Ave.
Jersey City, N.J.

2 Envelopes Miscellaneous checks, check stubs and bank items
Modern Agency, Inc.

NO. CONTINUATION SHEETS ATTACHED

7A. RECEIVED BY (Signature)
Edward J. Martin

7B. ADDRESS
120 Church St. N.Y.C.

7C. TITLE
Special Agent

7D. PHONE NO.
264-7000

8A. ACCOMPANIED BY (Signature)

8B. TITLE

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right

10A. DATE RETURNED
1/15/74

10B. PLACE AT WHICH RETURNED
120 Church St

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy – atty in fact

BY
Edward J. Martin S/A

FORM 2725 (Part 2) (REV [illegible])

9

FORM 2725
REV. DEC. 1971

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE
DOCUMENT RECEIPT

93

1. DOCUMENTS SUBMITTED IN RE:
[illegible]LLIS R. OSTRER [illegible] ASSOCIATED CORPORATIONS

2. DISTRICT
MANHATTAN

3. DATE
4-[illegible]-74

4. SUBMITTED BY
[illegible] ATTACHMENT [illegible]

5. PLACE OF SUBMISSION
[illegible] LEONARD ST, N.Y.C

6. ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

Equestrian Industries Inc.

1. One book containing General Ledger, Journal, Cash Receipts and Disbursements, Sales & Petty Cash Books for 8/1/69 to 4/30/73 inclusive
2. Cancelled checks & bank statements the National Bank of North America - 1/31/72 to 1/31/73 inclusive
3. Check book stubs - 12/31/68 to 1/15/73 for National Bank of North America

7. CONTINUATION SHEETS ATTACHED

7A. RECEIVED BY (Signature)
[illegible]

7B. ADDRESS
[illegible]

7C. TITLE
[illegible] AGENT

7D. PHONE NO.
[illegible]

8A. ACCOMPANIED BY (Signature)

8B. TITLE

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right

10A. DATE RETURNED
1/15/74

10B. PLACE AT WHICH RETURNED
170 Church St

10C. NAME OF PERSON RETURNING DOCUMENTS
Edward J. Martin R/A

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy - Atty in fact

Form 2725 (Part 2) (REV. 12-

(9)

Form 2725
(REV. DEC. 1972)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

94.

1. DOCUMENTS SUBMITTED IN RE:
[illegible] C. OSTRER AND ASSOCIATED CORPORATIONS

2. DISTRICT MANHATTAN	3. DATE [illegible]
4. SUBMITTED BY DISTRICT ATTORNEY, N.Y. COUNTY	5. PLACE OF SUBMISSION [illegible] LEONARD ST. N.Y.C

6. ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

[illegible] Importing Co.,
Cancelled checks & bank statements – Franklin
National Bank – 5/31/72 to 1/31/73 inclusive, and
deposit slips for above period.

NO. CONTINUATION SHEETS ATTACHED

7A. RECEIVED BY (Signature) [illegible]	7B. ADDRESS [illegible] CHURCH ST. NYC
7C. TITLE REVENUE AGENT	7D. PHONE NO. [illegible]
8A. ACCOMPANIED BY (Signature) [illegible]	8B. TITLE [illegible]

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right →	10A. DATE RETURNED 7/15/75	10B. PLACE RETURNED 170 Church St. 10C. NAME OF PERSON RETURNING DOCUMENTS Edward I. Martin R/A

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy - atty. in fact

Form 2725 (Part 2) (REV. [illegible])

9

FORM 2725
(REV. DEC. 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

95

1. DOCUMENTS SUBMITTED IN RE:
Louis C. Gainer and Associated Companies

2. DISTRICT
Manhattan

3. DATE
9-16-73

4. SUBMITTED BY
DISTRICT ATTORNEY
[illegible] N.Y. COUNTY

5. PLACE OF SUBMISSION
District Attorney's Office, Manhattan, N.Y.C.

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

cancelled checks + bank statements as follows:

Jan. through May 1972
July + Aug 1972
Oct. through Dec 1972
Jan 1973

Account # 1378-477-8 National Bank of North America

in name of:
Seymour Greenfield
880 Fifth Avenue
New York, N.Y.

NO. CONTINUATION SHEETS ATTACHED 1

7A. RECEIVED BY (SIGNATURE)
[illegible]

7B. ADDRESS
120 Church St, N.Y.C.

7C. TITLE
Revenue Agent

7D. PHONE NO.
264-[illegible]

8A. COMPANY (IF NOT EMPLOYEE)
[illegible]

8B. TITLE

9. Acknowledgment of return of documents

The above documents were returned to the person listed at right

10A. DATE RETURNED
1/15/74

10B.
120 Church St

10C.
Edward J. Martin R/a

11. SIGNATURE
William J. Riley - atty in fact.

COPY

FORM 2725 (Part 2) (REV.

1

DOCUMENT RECEIPT

[illegible] SUBMITTED [illegible]

[illegible] MANHATTAN

3. DATE 4-[illegible]-74

4. SUBMITTED BY [illegible] ATTORNEY [illegible]

5. PLACE OF SUBMISSION [illegible] ST, N.Y.C.

[illegible] ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

TRANS WORLD CHEMICAL CORP
CHECK STUBS - CENTRAL STATE BANK - 1971

[illegible] RECEIVED BY [illegible]

7A. ADDRESS [illegible] ST, N.Y.C.

7B. PHONE NO. [illegible]

8. TITLE [illegible]

9. ACKNOWLEDGMENT [illegible]

[illegible] CONTINUATION SHEETS ATTACHED

The above documents were [illegible] to me as [illegible] at [illegible]

10A. DATE [illegible] 1/15/74

10B. PLACE [illegible] 120 Church St

Edward I. Martin R/a

SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED

William J. Kilroy - atty in fact

COPY

FORM 2.25 (Part 2) (REV. [illegible]

9

FORM [illegible]
REV. [illegible]

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

19

1. DOCUMENTS SUBMITTED IN RE:
LOUIS C. OSTRER AND ASSOCIATED CORPORATIONS

2. DISTRICT
MANHATTAN

3. DATE
4-1[illegible]-73

4. SUBMITTED BY
DISTRICT ATTORNEY N.Y. COUNTY

5. PLACE OF SUBMISSION
155 LEONARD ST, N.Y.C.

6. ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

[illegible] Documents [illegible]
1. Bank statement and cancelled checks - Central State Bank - Jan, 1973.

NO. CONTINUATION SHEETS ATTACHED

7. RECEIVED BY (Signature)
[illegible]

7b. ADDRESS
120 CHURCH ST., N.Y.C.

TITLE
[illegible] AGENT

7b. PHONE NO.
[illegible]

8. ACCEPTED BY (Signature)
[illegible]

8b. TITLE

2. Acknowledgment of return of documents

The above documents were returned to me as indicated at right

10a. DATE RETURNED
1/15/74

10b. PLACE RETURNED
120 Church St.

10c. RETURNED BY
Edward J. Martin R/A

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy - atty in fact

GSP

FORM 2725 (Part 2) [illegible]

FORM 2725
(REV. DEC. 1973)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

98

1. DOCUMENTS SUBMITTED IN RE:
Louis C. Ostrer and Associated Corporations

2. DISTRICT
Manhattan

3. DATE
4 - 12 - 74

4. SUBMITTED BY
District Attorney N.Y. County

5. PLACE OF SUBMISSION
District Attorney's Office 155 Leonard St. NYC.

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

Bank Statement + cancelled checks Nov. 30 - Dec. 29, 1972
Envelope miscellaneous check book stubs
Bank: Manufacturers Hanover Trust Company Acct # 0-27533
Branch 092

Name: E & S. Finishing Corp.
937 East 79th Street
Brooklyn, N.Y. 11236

NO. CONTINUATION SHEETS ATTACHED

7A. RECEIVED BY (Signature)
[illegible]

7B. ADDRESS
120 Church St. NYC

7C. TITLE
Special Agent

7D. PHONE NO.
264-[illegible]

8A. ACCOMPANIED BY (Signature)
[illegible]

8B. TITLE
[illegible]

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right

10A. DATE RETURNED
1/5/76

10B.
120 Church St.

10C.
Edward J. Martin R/A

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy - Atty. in fact.

FORM 2725 (Part 2) (REV. [illegible])

9

FORM 2725
(REV. [illegible])

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

1. DOCUMENTS SUBMITTED IN RE:

[illegible] and Associated [illegible] 99

2. DISTRICT

Manhattan

3. DATE

[illegible] 74

4. SUBMITTED BY

DISTRICT ATTORNEY

[illegible] N.Y. COUNTY

5. PLACE OF SUBMISSION

District Attorney's office, [illegible] N.Y.C.

6. ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

11 Bank Statements & Cancelled checks [illegible] 1972 - [illegible] 1973.

1 Packet assorted cancelled checks & miscellaneous bank memos

[illegible] State Bank, [illegible] Acct # [illegible]

Name: Continental Imports Co.

377 Fifth Ave.

N.Y., N.Y. 10016

1 Envelope Check Book Stubs

NO. CONTINUATION SHEETS ATTACHED

7A. RECEIVED BY (Signature)

7B. ADDRESS

7C. TITLE

Revenue Agent

7D. PHONE NO.

8A. ACCOMPANIED BY (Signature)

8B. TITLE

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right →

10A. DATE RETURNED

1/15/74

10B. PLACE [illegible]

120 Church St.

10C. NAME OF PERSON RETURNING DOCUMENTS

Edward J. Martin - R/A

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS RETURNED

William J. Riley - atty in fact

COPY

FORM 2725 (Part 2) (REV. [illegible])

9

DOCUMENT RECEIPT

1. DOCUMENTS SUBMITTED RE:

LOUIS C. OSTRER AND ASSOCIATED CORPORATIONS

2. DISTRICT

MANHATTAN

3. DATE

4-12-71 100

4. SUBMITTED BY

DISTRICT ATTORNEY [illegible] NEW YORK COUNTY

5. PLACE OF SUBMISSION

155 LEONARD ST, N.Y.C.

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

DARREN ALDEN CO INC,

1. Cancelled checks & bank statements – Republic National Bank – 11/30/70 to 8/31/71, 2 deposit [illegible] August 1971
2. Cancelled checks & bank statements – National Bank of North America – Sept. 1970 to Aug. 1971 inclusive

7. RECEIVED BY (Signature)

[illegible] Martin

7a. ADDRESS

120 CHURCH ST. N.Y.C.

TITLE

REVENUE AGENT

7b. PHONE NO.

[illegible]

8. ACCOMPANIED BY (Signature)

[illegible]

8b. TITLE

[illegible]

NO. CONTINUATION SHEETS ATTACHED

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right

10a. DATE RETURNED

1/15/74

10b. [illegible]

120 Church St

Edward D. Martin R/A

SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED

William J. Kilroy – Atty-in-fact

Form 2725 (Part 2) (Rev. [illegible])

9

FORM 2725
(REV. FEB. 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

1. DOCUMENTS SUBMITTED RE:
[illegible] 10

2. DISTRICT
[illegible]

3. DATE
[illegible]

4. SUBMITTED BY
[illegible]

5. PLACE OF SUBMISSION
55 [illegible]

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

Hematology Chemputer, Inc.

Miscellaneous check stubs & checks

NO. CONTINUATION SHEETS ATTACHED:

7A. RECEIVED BY (Signature)
[illegible]

7B. TITLE
[illegible] Agent

7C. ADDRESS
[illegible]

7D. PHONE NO.
[illegible]

8A. ACCOMPANIED BY (Signature)
[illegible]

8B. TITLE
[illegible]

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right

10A. DATE RETURNED
7/15/74

10B. PLACE RETURNED
120 Church St.

10C. RETURNED BY
Edward J. Martin R/A

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy - atty in fact.

COPY

FORM 2725 (Part 2) (REV.

9

FORM 2725
(REV. [illegible])

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

1. DOCUMENTS SUBMITTED IN RE:
Lewis C. Geiger and Associated Corporations 102

2. DISTRICT
Manhattan

3. DATE
[illegible]

4. SUBMITTED BY
[illegible] N.Y. County

5. PLACE OF SUBMISSION
155 Leonard St., N.Y.C.

6. ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

Lewis C. Geiger & Assoc.

Various telephone tolls 1970 through 1973

RECEIVED BY (Signature)
[illegible] Martin

NO. CONTINUATION SHEETS ATTACHED

7b. ADDRESS
[illegible]

TITLE
[illegible]

PHONE NO.
[illegible]

ACCOMPANIED BY (Signature)
[illegible]

8b. [illegible]

The above documents were returned to me as indicated at

10. DATE RETURNED
1/15/74

120 Church St

Edward J. Martin R/A

SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy - atty. in fact

FORM 2725 (Part I) (REV. [illegible])

FORM 2725
(REV. [illegible] 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

103

1. DOCUMENTS SUBMITTED IN RE:
LOUIS G OSTRER AND ASSOCIATED CORPORATIONS

2. DISTRICT
MANHATTAN DISTRICT

3. DATE
4-[illegible]-74

4. SUBMITTED BY
DISTRICT ATTORNEY [illegible] NY COUNTY

5. PLACE OF SUBMISSION
DISTRICT ATTORNEY'S OFFICE, 155 LEONARD ST, N.Y.C.

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

FRINGE PROGRAMS INC — GENERAL LEDGER, PURCHASE RECEIPTS & DISBURSEMENTS JOURNALS, ACCOUNTS PAYABLE LEDGER. FOR FY 11/30/70, 11/30/71 & 11/30/72

Cancelled checks & bank statements - Central State Bank
7/30/71 to 12/31/71 inclusive, [illegible], [illegible]/31/72, [illegible]/31/73
[illegible]/31/72 to 6/30/72 inclusive, [illegible] & 10/31/72, 11/30/72
Cancelled checks & bank statements - Republic National Bank
miscellaneous deposit tickets 1970 & 1971
Miscellaneous - cancelled checks & bank statements 1970 & 1971
Miscellaneous deposit tickets - 1971 & 1972 - Central State Bank
Check book stubs on Republic National Bank - 1972

NO. CONTINUATION SHEETS ATTACHED

7A. RECEIVED BY (Signature)
[illegible]

7B. ADDRESS
1[illegible] CHURCH ST, N.Y.C.

7C. TITLE
REVENUE AGENT

7D. PHONE NO.
2[illegible]

8A. ACCOMPANIED BY (Signature)
[illegible]

8B. TITLE

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right

10A. DATE
7/15/74

10B. [illegible]
120 Church St.

10C. [illegible]
Edward I. Martin R/A

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE [illegible]
William J. Kilroy - atty. in fact

COPY

FORM 2725 (Part 2) (REV. [illegible])

FORM 2725
REV. [illegible]

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

1. DOCUMENTS SUBMITTED IN RE:

104

[illegible] & OSTIER AND ASSOCIATED CORPORATIONS

2. DISTRICT
MANHATTAN

3. DATE
4-12-74

4. SUBMITTED BY
DISTRICT ATTORNEY
[illegible] NY COUNTY

5. PLACE OF SUBMISSION
DISTRICT ATTORNEYS OFFICE, 155 LEONARD ST, NYC

6. ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

American Truck Service Club Inc.

1. Cash book 1969 to 1971
2. Bank statements & cancelled checks for Franklin National Bank - Dec, 1969 thru August, 1970 inclusive
3. Bank statements & cancelled checks for First National City Bank - [illegible], 1970, 5/[illegible]/70, Aug 1970 to Dec 1970 inclusive.
4. Bank statements & cancelled checks for [illegible] Bank & Trust Co - 5/[illegible]/71 to 4/30/72 inclusive
Stock Transfer [illegible]
5. Bank statements & cancelled checks Chemical Bank - [illegible]/70 to 2/25/71 & check book stubs for [illegible] to June 1971
6. Payroll record book 1970
7. [illegible], [illegible] accounts receivable, [illegible] ledger, [illegible]

NO. CONTINUATION SHEETS ATTACHED

7a. RECEIVED BY (Signature)

7b. TITLE
[illegible] AGENT

7c. ADDRESS
120 CHURCH ST, NYC

7d. PHONE NO.
[illegible]

8a. ACCOMPANIED BY (Signature)

8b. TITLE

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right →

10a. DATE RETURNED
7/15/74

10b. PLACE RETURNED
120 Church St.

10c. NAME OF PERSON RETURNING DOCUMENTS
Edward J. Martin S/A

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy - atty in fact

(9)

COPY

FORM 2725 (Part 2) (REV. 12-70)

FORM 2725
(REV. DEC. 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

1. DOCUMENTS SUBMITTED IN RE:

105

LOUIS C. OSTRER AND ASSOCIATED CORPORATIONS

2. DISTRICT

MANHATTAN

3. DATE

4-[illegible]-74

4. SUBMITTED BY

DISTRICT ATTORNEY N.Y. COUNTY

5. PLACE OF SUBMISSION

155 LEONARD ST. N.Y.C.

6. ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

- One portfolio of tax records for
  [illegible] Agency Inc.
  [illegible] Agency Inc
  Overseas Travel Service Club Inc
  Foreign Programs Inc
- One portfolio of prior years income tax records for
  [illegible] Industries Inc.
  [illegible] Agency Inc.
  [illegible] Programs Inc.
- Miscellaneous Forms 1099 - 1971 & 1972 from various corporations for [illegible], Louis C. Ostrer - Account, and various associated corporations

NO. CONTINUATION SHEETS ATTACHED

7a. RECEIVED BY (signature)

Edward I. Martin

7b. ADDRESS

120 CHURCH ST. N.Y.C.

TITLE

SPECIAL AGENT

7c. PHONE NO.

264-[illegible]

8a. [illegible] (signature)

8b. TITLE

9. [illegible]

[illegible] Dec [illegible]

The above documents were returned to me as indicated at

10a. DATE RETURNED

7/15/74

10b. PLACE

120 Church St.

10c. PERSON RETURNING DOCUMENTS

Edward I. Martin R/A

SIGNATURE [illegible] DOCUMENTS WERE RETURNED

William J. Kiley - atty in fact

COPY

(9)

FORM 2725 (Part 2) (REV. 12-70)

[illegible] IN RE: [illegible] OSTER AND ASSOCIATES CORPORATIONS

DOCUMENT RECEIPT

[illegible] REVENUE SERVICE

DISTRICT: MANHATTAN

SUBMITTED BY: [illegible]

3. DATE: 4-1[illegible]-74

5. PLACE OF SUBMISSION: 1[illegible] LEONARD ST, N.Y.C.

I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

Miscellaneous purchases and sales statements & Accountings by [illegible] Sidney Greenfield, William Kilroy, Steve Martin [illegible] Herzfeld & Stern, [illegible] for 1970 & 1971 [illegible], Inc, [illegible] Co, [illegible] ( ) [illegible]

7A. (Signature): [illegible]

7B. ADDRESS: [illegible] N.Y.C.

NO. CONTINUATION SHEETS ATTACHED

9. [illegible]

Documents were [illegible] at

10A. DATE RETURNED: 7/15/75

120 Church St

Edward S. Martin R/a

William J. Kilroy - atty. in fact.

COPY

9

FORM 2725 (Part 2) (REV. 12-70)

FORM 2725
(REV. DEC. 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

107

1. DOCUMENTS SUBMITTED RE:
Louis G. Ostrer and Associated Corporations

2. DISTRICT: Manhattan

3. DATE: [illegible]-19-74

4. SUBMITTED BY: Dist. U.S. Attorney, N.Y. South

5. PLACE OF SUBMISSION: 155 Leonard St., N.Y., N.Y.

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

1. Cancelled checks of Foreign Programs Inc., various dates July to Dec., 1971 and Jan to Dec., 1972. on the Central State Bank.
#1010, 1014, 1001, 1003, 1007, 1035, 1037, 1044, 1049, 1062, [illegible], 1013, 1091, 1115, 1147, 1149, 1170, 1181, 1193, 1194, 1321, 1399, 1514, 1516, 1537, 1577, 1604, 1753, 1992, 2163, 2165, 1370, 1385, 1429

photocopy #1392 –

2. Cancelled checks of Foreign Programs Inc; various dates during 1971 & 1972 on Central State Bank. Checks endorsed by check cashers.
Checks # 1061, 1010, 1168, 1199, 1104, 1175, 1392, 1503, 1441, 1748, 1534, 1544, 1781, 1556, 1669, 1775, 1776, 2005, 1482, 1382, 1377, 1427, 1440, 1512, 1699, 1693

NO. CONTINUATION SHEETS ATTACHED

7a. RECEIVED BY (Signature): [illegible] Martin

7b. ADDRESS: 120 Church St. N.Y.C.

7c. TITLE: [illegible]

7d. TELEPHONE NO.: [illegible]

8a. AGENT (Signature):

8b. TITLE:

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right →

10a. DATE RETURNED: 7/15/74

10b. PLACE AT WHICH RETURNED: 170 Church St.

10c. BY: Edward L. Martin

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED: William J. Kilroy - atty in fact.

(9)

FORM 2725 (Part 2) (REV. 12-70)

FORM 2725
(REV. DEC. 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

108

1. DOCUMENTS SUBMITTED IN RE:
[illegible] ASSOCIATED CORPORATIONS

2. DISTRICT OF
MANHATTAN

3. DATE
4-19-74

4. SUBMITTED BY
DISTRICT ATTORNEY N.Y. COUNTY

5. PLACE OF SUBMISSION
155 LEONARD ST, NY, NY

I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

1. Cancelled checks of [illegible] Agency Inc, April, 1971 Check Nos. 159, 173-175 and, 154-159 and 364, 376, 392, 171, 172, 176 [illegible] Bank & Trust Co. account.
2. Cancelled checks of [illegible] Agency Inc., [illegible] dates Jan 1971 to March 1971.
Checks Nos. 114, 115, 117, 121, 126, 132, 146, 399.

NO. CONTINUATION SHEETS ATTACHED

7A. RECEIVED BY (Signature)
Edward J. Martin

7B. TITLE
Special Agent

7C. ADDRESS
120 Church St., N.Y.C.

7D. PHONE NO.
264-8[illegible]

8A. ACCOMPANIED BY (Signature)

8B. TITLE

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right →

10A. DATE RETURNED
7/15/74

10B. PLACE RETURNED
120 Church St.

10C. SIGNATURE OF PERSON RETURNING DOCUMENTS
Edward J. Martin S/A

11. SIGNATURE OF RECIPIENT TO WHOM DOCUMENTS WERE RETURNED
William J. Kilroy - atty. in fact.

COPY

7

FORM 2725 (Part 2) (REV. 12-70)

FORM 2725
(REV. DEC. 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

109

1. DOCUMENTS SUBMITTED IN RE: [illegible]

2. DISTRICT [illegible]

3. DATE [illegible]

4. SUBMITTED BY [illegible]

5. PLACE OF SUBMISSION [illegible]

I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

[illegible]

[illegible]

[illegible] 1775, 1776, [illegible]

[illegible]

[illegible] #101 [illegible]

[illegible]

[illegible] 364, 365, [illegible] 1970

[illegible]

[illegible] 1971

NO. CONTINUATION SHEETS ATTACHED

6. RECEIVED BY (Signature) [illegible]

7A. ADDRESS

TITLE

7B. PHONE NO.

8A. ACCOMPANIED BY (Signature)

8B. TITLE

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right →

10A. DATE RETURNED 7/15/74

10B. ADDRESS WHERE RETURNED 120 Church St.

10C. NAME OF PERSON RETURNING DOCUMENTS Edward J. Martin R/A

①

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. Kiley atty. in fact.

COPY

FORM 2725 (Part 2) (REV. 12-70)

FORM 2725
(REV. DEC. 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

110

1. DOCUMENTS SUBMITTED IN RE:
[illegible] C. [illegible] and [illegible] Corporations

2. DISTRICT
[illegible]

3. DATE
[illegible]

4. SUBMITTED BY
[illegible]

5. PLACE OF SUBMISSION
[illegible] N.Y.C.

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

1. [illegible] checks [illegible] Agency, Inc. [illegible]
acct. # 1632 4736

2. 3 checks [illegible] Agency [illegible]
acct. # [illegible]

NO. CONTINUATION SHEETS ATTACHED

7A. RECEIVED BY (Signature)
[illegible]

7B. TITLE

7C. ADDRESS
[illegible] N.Y.C.

7D. PHONE NO.
[illegible]

8A. ACCOMPANIED BY (Signature)

8B. TITLE

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right →

10A. DATE RETURNED
7/15/74

10B. PLACE AT WHICH RETURNED
120 Church St.

10C. NAME OF PERSON RETURNING DOCUMENTS
Edward I. Martin R/A

11. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED
William J. [illegible] - Atty. in fact.

COPY

FORM 2725 (Part 2) (REV. 12-70)

111

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

LOUIS C. OSTRER,
RITA OSTRER,
JACK OSTRER, and
DINA GELMAN,

Plaintiffs,

-against-

WILLIAM I. ARONWALD,
ROBERT B. FISKE, JR.,
ALAN NAFTALIS,
MARVIN SONTAG,
JAMES KILLEEN,
EDWARD H. LEVI, and
UNITED STATES OF AMERICA,

Defendants.

-----------------------------------x

Civil Action
No.__________

AFFIDAVIT

AFFIDAVIT OF LOUIS C. OSTRER

LOUIS C. OSTRER, being first duly sworn according to law, deposes and says:

1. My name is Louis C. Ostrer. I reside at 181 Kings Point Road, Kings Point, New York. My business offices are at 377 Fifth Avenue, New York, New York.

2. On the basis of reliable information conveyed to me by my attorneys (see filed affidavits of Alan Dershowitz, Harvey A. Silverglate and Richard H. Wynn), I am aware that I am the target of a criminal investigation being conducted by the Department of Justice's Organized Crime Strike Force for

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the Southern District of New York.

3. On June 11, 1976, my attorneys attended a meeting at the offices of the Strike Force to discuss the status of the investigation. At that meeting my attorneys learned that the Strike Force is planning to seek indictments for income tax violations in the very near future not only against me, but also against my wife Rita Ostrer, my father Jack Ostrer, my sister Dina Gelman, and my son Benjamin Ostrer.

4. At the meeting the Strike Force attorneys proposed a "deal", by means of which my family, and possibly myself, might be able to avoid indictment. If I agree to cooperate fully with the government and give evidence concerning "labor racketeers" and "organized crime figures" with whom I allegedly "associate", then the indictments will not be brought. It is clear that it is my testimony which the government is interested in, as my attorneys were told that even if other members of my family choose to cooperate, they will still not be saved from indictment unless I agree to cooperate as well. At the same time, if I were to cooperate to the Government's satisfaction, that would be sufficient to "wash" everyone out of the case.

5. This is not the first time that a government agency has attempted by means of threats or harassment to coerce me into testifying concerning individuals about whom I allegedly have information. In fact, for the past six years I have been

the target of continued harassment (as detailed below) by federal, state and local authorities, all aimed at getting my cooperation. This harassment has involved surveillance, the fabrication of death threats, imprisonment, disruption of my business, intimidation of business clients and associates, the leaking of damaging rumors and innuendoes to the media, and other indictments. However, I regard this latest attempt as the most outrageous as it is directed not only against me but against my family as well. Even though I believe these indictments are without merit, and would therefore be dismissed or acquittals would result, they would subject my family and myself to acute embarrassment and anguish. While such injury would be serious for the rest of us, the damage caused by indictment to my son, Benjamin Ostrer, would be devastating. This past June he graduated from New York Law School, and is now a candidate for entrance to the New York Bar. I have been informed that an indictment, even if ultimately proved to be groundless, can seriously hinder his chances of being admitted to the bar. At the meeting with the Strike Force this fact was mentioned by the Strike Force members. They took note, and even acknowledged at one point that there was insufficient evidence to justify an indictment against my son. However, they made it clear that he was still being considered as a target and that the issue of whether he would be indicted would depend on me.

6. The cruelty and recklessness of this latest strategy can be understood only against the backdrop of a long series of efforts, largely improper or illegal, by government officials at all levels to get from me information which they believe I possess, by proving to me how miserable they can make my life if I do not "come over" to their side.

7. I have been the subject of sustained surveillance since at least 1972. From October 25, 1972, through February 21, 1973, my office was under active surveillance through a wiretap and eavesdrop device placed by the District Attorney for New York County. The surveillance device still has not been removed by the authorities. The wiretap series was later found to be illegal by the New York Supreme Court. Only recently I again discovered this active electronic "bug" on one of my office telephones. It is capable of monitoring not only my telephone calls, as was the wiretap, but all conversations taking place in the office as well. I can only assume that such surveillance has been going on in one form or another since 1973.

8. One result of this illegal wiretap was a search of my business offices by the New York County D.A. which was carried out on February 21, 1973, the day the wiretap was supposedly terminated. In this search my entire office was cleaned out. Notice of the search was obviously leaked in advance to the media by the D.A.'s office, as television cameras and newsmen were waiting outside to record the removal of the office contents.

Virtually all my records, including business and personal records, correspondence, notes, and papers, plus some belonging to my family and associates, and a good deal of expensive merchandise, were taken. These materials were held by the D.A. for about nine months. In the interim I was unable to conduct my business properly. I was given permission on only a few occasions to see the records and make copies so that I could begin to reconstruct my files. When everthing was to be returned to me by order of a New York Supreme Court Judge (Hon. Jacob Grumet), the D.A.'s office notified IRS of this fact and requested that IRS serve the DA's office with an IRS administrative summons in order to insure that the records be retained rather than returned to me. IRS complied with the DA, thereby conspiring to frustrate and defeat Justice Grumet's order, by issuing such a summons on or about November 8, 1973, for the papers, thereby resulting in their being kept at the DA's office for an additional period of about eight months (until July 15, 1974), during which time both the DA's staff and the IRS examined them.

9. The search was ultimately declared illegal as it was derived from the illegal wiretaps. However, I never regained much of what was seized. I was never given a complete inventory by the D.A. of everything taken so I cannot be certain as to exactly what the missing documents are. However, it is clear to me that some were not returned as there are still gaps in my files. In correspondence with the New York District Attorney's Office (see attached Exhibit "A" letter of July 23, 1974, from Austin V. Campriello) it has been confirmed that some material has been retained.

10. The seizure of all of my records in that search gave both federal and state authorities full opportunity to look into my business activities. Nonetheless, these same records

have been the subject of repeated subpoena and examination. They were subpoenaed and examined for over two years by investigators from the United States Senate Permanent Subcommittee on Investigations of the Committee on Government Operations. Although most of the time the examination took place at my offices, the process was extremely disruptive of my business. Now this month, the same records have been the subject of a slew of new subpoenas. Grand juries sitting in Detroit and in the Southern District of New York have subpoenaed these records. The New York subpoena was served on Thursday, July 8, 1976, by Strike Force representatives and by an I.R.S. agent who has audited the records of several of the involved businesses in past years. On the following day, Friday, July 9, 1976, an investigator from the United States Department of Labor appeared at my offices with another subpoena for examination of the same records. It is not clear what purpose these repeated examinations can serve except to harass me and disrupt my affairs.*

11. The harm done by the search of my office premises did not stop with the seizure of my papers and the disruption of my business. I was taken into custody by the District Attorney of New York County and brought before the Hon. Jacob Grumet of the State Supreme Court. The Assistant District Attorney, John C. Fine, represented to the Court that I had "important information" about an organized crime plot "to assault and murder a certain person." He stated in open court that my life was in danger.

---

*See appendix "D" for copies of subpoenas.

Mr. Fine asked that I be held as a material witness. Justice Grumet set bail at $250,000. and sent me to the Civil Jail until bail could be posted. I finally posted bond and left the jail, but I was promptly rearrested by officers bearing a warrant charging me with violating the terms of my probation on an earlier conviction. I then spent the week-end in the Manhattan House of Detention for Men (the "Tombs", which has since been declared to be in violation of the Eighth Amendment ban on cruel and unusual punishments). Nothing came of the threats against my life alleged by Mr. Fine, for in fact there were not any such threats. The alleged conspiracy to murder about which I was alleged to have information was a total sham. Yet while nothing ever materialized from these fantastic claims, the immediate result was that I was incarcerated in unspeakable conditions over the week-end. All of these events were widely publicized and caused me and my family a good deal of embarrassment, humiliation, and financial loss. The authorities have in dealing with me managed to attract an undue amount of publicity. The story of my arrest as a material witness and my re-arrest as a parole violator was given great prominence in the New York Sunday News of February 25, 1973, and has since been reprinted in the "Staff Study of the Severance Pay - Life Insurance Plan of Teamsters Local 295" of the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate (U.S. Government Printing

Office, Washington, D.C., June 11, 1976), page 39 of which, containing the aforesaid newspaper report, is appended hereto as Exhibit "B".

12. The aforesaid incident was engineered in large measure by Assistant District Attorney John C. Fine, who was working closely with Federal investigators and prosecutors in an effort to harass me. For example, on several occasions at least, Mr. Fine spoke and met with members of the Office of the United States Attorney for the Southern District of New York in order to share with them material gathered from the unlawful wiretap/electronic surveillance device placed by the D.A.'s office on my office phone and premises. Mr. Fine also shared with Federal prosecutors information about me and my background. Mr. Fine has admitted under oath in a hearing before a Judge of this Court, such active collaboration and cooperation between state and Federal officials such as I have described here. State and federal agencies have shuttled me and my business records back and forth as if it were a game of tennis or, more aptly, "monkey in the middle", with me as the monkey.

13. Curiously, the aforesaid claim that my life is in danger has become a favorite means of the Federal Government in order to harass me and ruin my business, in order to persuade me to tell the Government precisely what it wants to hear and what it wants a jury to hear. On various occasions

I have been informed by Federal Government agents that I am on a "hit list" destined for violent extinction by "the mob". These agents have indicated that I can receive protection from the Government if I cooperate fully with them. Some time in the past, I was visited by two agents of the Federal Bureau of Investigation (FBI), whose last names I recall as sounding like "Lorey" and "Bernardo", who told me that they had received word from their informers that I was marked for mutilation and death by "the mob." They offered me protection if I were to request it and agree to be debriefed. These "death threats" from the government have continued. Several months later I was called by a television reporter from CBS in Detroit, who said the FBI told her that I was on a "hit list" of organized crime. She also passed on the word that I should seek protection from the government and asked, at the same time, for an interview. On another occasion there was a shooting through an office door in the same building where my offices are located. Government agents later came to inform me that the shots were actually meant for me and again offered me their protection in exchange for cooperation.

14. Not only have such reports of death threats been reported to me by Federal agents, but such agents have spread rumors among my business associates that I am a marked man, and as a result some of these associates have at times actually been afraid to walk with me for fear of catching a

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stray bullet. This was part of a concerted and calculated effort to isolate me from my business and social acquaintances and to ruin my business, all of which was part of a larger scheme to force me to tell the Government what it wished to hear about labor leaders and unions that I have supposedly known and with whom I have supposedly dealt. My indictment in United States v. Ostrer, No. 71-CR-558, in which I was convicted, was similarly motivated by a desire to force me to testify against others with whom I was allegedly associated. Prior to that indictment my trial counsel Maurice Edelbaum, and I met with Robert Morvillo, the then-head of the Criminal Division of the United States Attorney's Office for the Southern District of New York. Mr. Morvillo admitted that the key government witness, one Michael Hellerman, had told him that I was a "victim" in the stock manipulation swindle. Nonetheless, said Mr. Morvillo, my testimony was required and if I refused to cooperate I would be indicted and tried as a co-conspirator.

15. Needelss to say, these repeated encounters with the government have resulted in extensive unfavorable publicity in the newspapers and broadcast media which have caused me and my family embarrassment and contributed to the loss of a large part of my clientele. Much of this publicity has been generated by planned "leaks" from various government offices. One Mr. Camp, a TV reporter in Miami, broadcast a story that I was a mobster from New York who came to Florida to do union work and that I was under investigation by the Justice Department in

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Miami. This was untrue.

16. My business has also been hurt by direct harassment of associates and clients. People have been interviewed by government agents and told that they would be better off not doing business with me. While I have heard rumors and second-hand stories of several such discussions, I know with more precision of one such incident involving Alex Krausz, a stamp dealer with whom members of my family have done business. An IRS agent named Ryan came to his home to discuss Mr. Krausz' dealings with me and told Mr. Krausz that he could get in trouble if he continued to associate with me. (See statement of A. Krausz'attached hereto as Exhibit "C".) Also, following the seizure of my records and merchandise from my offices on February 21, 1973, detectives visited all of the suppliers from whom I purchased these goods, ostensibly to inquire whether they had been stolen from them. The effect of these inquiries has obviously been to make people less willing to do business with me.

17. I believe that much of the harassing investigations and threatened prosecutions against me of the last few years stems, at least in significant part, from pressures being placed on Federal law enforcement agencies by the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate (hereinafter "the Subcommittee"). The Subcommittee does not like the Teamsters

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Union and those who deal with it, and the Subcommittee has consequently urged harassment of certain persons, including me and my business associates and family. The Subcommittee's desire that I be pursued is being carried out by governmental agencies eager for such a witch-hunt, armed as they are with unlawfully obtained material obtained largely from state agencies pursuant to the unlawful eavesdropping and seizures. Most recently, the Subcommittee published earlier this year a compilation of information concerning my own and my associates' business activities, much of it defamatory and untrue, much of it highly exaggerated and inflammatory, and much of it based upon information obtained by the Subcommittee and by other state and Federal agencies, directly and indirectly by unlawful and unconstitutional means. That publication -- entitled "Staff Study of the Severance Pay - Life Insurance Plan of Teamsters Local 295 (Government Printing Office, Washington, D.C., dated June 11, 1976) -- contains an introductory memorandum (at p. III) indicating that "copies of this staff study are being referred to the Departments of Labor and Justice, the Internal Revenue Service, and the Headquarters of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America."

18. It has become clear that the Departments of Justice and Labor, and in particular the Strike Force, are seeking to gain approbation from and favorable publicity in the public

and the Congressional are[illegible] by pursuing myself and my family and associates, even though absent such pressure we would probably not be targets of such harassment. This is virtually admitted by the Subcommittee in the aforesaid staff study at page 35: "A severance pay - insurance plan provides a variety of probably legal but certainly questionable methods for mobsters to obtain huge amounts of funds." [emphasis supplied] Thus, on the basis of my own and my associates' successful business ventures with the Teamsters Union and other (mostly labor) organizations and persons not favored by the Government, the Government is seeking, and has been largely successful in its effort, to seriously impair the means by which we earn a livelihood by admittedly "probably legal" means.

19. As the prospective indictments appear to involve alleged tax violations and perhaps my union-related pension fund activities as well, I believe that evidence upon which they will be based will derive almost exclusively, if not exclusively, directly or indirectly, from the records of my business activities which have gotten into government hands and which came to government attention by unconstitutional and unlawful means. Another possible source of evidence may be the testimony of one or possibly more of my business associates who have worked with me and who have been threatened, coerced and virtually bribed to give false testimony against me. It is my

belief, based upon my own knowledge and upon testimony which was given at the proceedings before the New York State Insurance Department which took place in New York City in March of 1976 (transcripts of which are available) that all of this evidence is necessarily tainted by its derivation from the illegal wiretaps and eavesdrop placed on my office, or from the resultant seizures. In the search of my business offices on February 21, 1973, virtually all of my business records going back several years were seized. This search was illegal, as probable cause for it was developed from the illegal wiretaps. All of the federal and state agencies currently investigating me, including the Strike Force, have seen and used these documents. The leads which these investigations are pursuing, the interest which they are showing in certain records from later years, and the inquiries which they are making of potential witnesses, are all derived ultimately from their knowledge of these "tainted" documents. As the transcripts of the New York Insurance Department proceedings will show, the interconnections between all of these current investigations are exceedingly complicated. Each has fed information and leads to the other. Therefore, it is reasonable, indeed it is inescapable, to assume that even when only one agency has directly used any particular tainted evidence, the others have at least indirectly relied upon and used it as well.

20. The interconnections between these several investiga-

tions and the chains of taint from one to the other need to be explored further at an appropriate hearing. However, to the best of my understanding, the taint has spread to all of the investigations, and ultimately the current one being pursued by the Strike Force, by at least the following route. In the Fall of 1972, the New York County D.A. placed my business offices under electronic surveillance, based on leads provided by other unlawful wiretaps and also perhaps on leads provided by the New York State Insurance Department, which was investigating my work on the Severance Pay-Life Insurance Plan of Teamsters Local 295. The surveillance led to a search warrant being obtained. After my business records were seized in the search on February 21, 1973, they were taken to the office of the New York County District Attorney (NYDA). There they were examined by investigators from the New York State Insurance Department (NYSIF) and from the Sub-Committee. On the very day that State Supreme Court Justice Jacob Grumet ordered the records returned to me, the D.A.'s office informed the IRS of this order, and the IRS promptly issued a summons for the records, causing the DA's office to keep them for an even longer period of time. Even though the IRS served the DA with a summons, the IRS did not take the documents, but instead left them in the DA's custody, while IRS agents made frequent visits to the DA's office to peruse all of the varied documents and records seized by the DA in the aforesaid unlawful raid and search and seizure.

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21. I am informed that Edward I. Martin, an IRS employee, claims that he visited my office on March 8, 1973, at which time he requested that I allow him to examine certain books, records and other documents in the possession of myself and certain corporations in order to determine my tax liability. Mr. Martin claims, I am further informed, that I told him that the DA's office had the records and that he should seek them there. I did not see Mr. Martin on March 8, 1973, for I was not at my office on that day, as my records clearly indicate. Nor did I at any time instruct or even hint to Mr. Martin that he should examine my records at the DA's office. Had Mr. Martin at that or any other time have asked me to voluntarily produce such records, I would have refused. Had Mr. Martin served me with an IRS administrative summons for such records, I would have still refused. Had Mr. Martin served me with a valid court subpona, I would have sought to have it quashed. Furthermore, the documents seized by the D.A. were far more extensive and broad-ranging than any documents that would have been producible by me pursuant to an IRS investigation into my tax liability. The seized records included corporate and business papers unrelated to my tax liability. It included papers and records concerning my family members, business associates, and employees, nearly all of which was and is unrelated to my personal tax liability. Thus, by examining my records at the DA's office, the IRS circumvented my right to object to any request that I produce my records, and the IRS at the same time managed to examine a far broader range of items

than would have been producible by me pursuant to any valid, enforceable subpoena that might have been served upon me had I had the records if and when visited by Mr. Martin or other IRS agents. Furthermore, Mr. Martin is inaccurate in claiming that he came to my office on March 8, 1973, seeking certain of my books and records and those of certain corporations, for it was not until October, 1973, that I received from the IRS a notice that Mr. Martin had been assigned to look into my tax liability and wanted access to my records. If Mr. Martin had come to my office in March looking for such records, why was I not given notice until eight months later that he was assigned to my case and wanted access to my records? It is extraordinarily unlikely that he came to my office routinely looking for books and records without giving me prior notice to produce same. In fact, he almost certainly had read or heard of the February 21, 1973, raid on my office, which was widely covered in the news media. I know that the IRS heard of the news of the raid at around the time that it occurred, because one IRS agent told me that the IRS at that time could not settle my civil tax liability because the DA's raid made me too "hot". Therefore, it is obvious that any visit by Mr. Martin and other IRS agents to my offices would have been prompted by the DA's raid, and since I was at no time until October 1973 served with a written request to produce my records, Mr. Martin must have known that the records were in

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the DA's custody in March of 1973.

22. William J. Kilroy was an employee of mine or of companies with which I have been associated for many years up until April 1975. He was working at my offices at 377 Fifth Avenue during the period that the aforesaid unlawful wiretapping and electronic eavesdropping was in progress, and his voice was picked up on the tapes. Documents of his, and documents referring to or naming him, were seized in the aforesaid raid of my offices. This material was available to and reviewed by federal agents while it was at the DA's office, and it was via this material that Federal agents became aware of the nature and extent of Mr. Kilroy's involvement in and knowledge of my business and personal affairs. Mr. Kilroy, who is thus a fruit of the unlawful wiretapping and eavesdropping as well as the unlawful search and seizure, has been subpoenaed to testify before a grand jury in the Southern District of New York against me and members of my family and business associates.

23. At the aforesaid hearings held earlier this year before the New York State Insurance Department, it emerged that the NYSID was in constant contact with the New York D.A. and the IRS concerning my case and my affairs. Also, the Sub-Committee investigators cooperated with the NYSID. The Strike Force has also been working closely with the IRS on the current investigation. Over a year ago, the IRS began investigating and auditing my father and son Benjamin. The Strike

Force's plan to indict them for conspiracy with me obviously grows out of this IRS investigation which is itself tainted by reliance on the illegally seized records. At the NYSID hearings it emerged that the Strike Force was in contact with the NYSID. My attorney, Richard C. Wynn, has informed me that he was told by William I. Aronwald at the May 19, 1976 meeting, that the Strike Force issued subpoenas to the NYSID for its documents. Mr. Aronwald also stated to Mr. Wynn that he (Aronwald) is familiar with all of these prior investigations. All of these links and interconnections suggest that all of the investigations have been tainted by each other in a variety of ways derived from the illegal wiretaps and electronic eavesdropping and resultant searches and seizures.

24. In February and March of 1974, I testified for nine days before a New York State Grand Jury under a grant of transactional immunity. I cooperated fully and answered comprehensive questions, my answers filling over 1600 pages of transcript. My testimony covered virtually all of my business and financial affairs. I answered questions concerning my business practices, my financial transactions, including personal and business lending and borrowing, and my income. Many of the questions were based on illegal wiretaps. It is my belief that at least NYSID and IRS investigators had access to transcripts of my testimony and used it as a source for further inquiry into my affairs. All such further inquiry is,

therefore, doubly tainted because it is derived from immunized testimony, which itself was tainted by the illegal taps that preceded it. It is my belief that further inquiry will show that the Strike Force's evidence derives from consideration of this grand jury testimony, either directly or indirectly from leads and evidence derived therefrom.

25. As can be seen from the factual pattern adduced above, governmental authorities have tended to increase the pressure against me at such times when it has appeared to them that their previous attempt to "break" me ended in failure. For example, as has been noted in more detail earlier in this affidavit:

(a) State authorities had me placed in the Civil Jail and held as a "material witness" to no crime at all, with a bail bond set at an exhorbitant quarter of a million dollars. When I posted a bond and was released, I was re-arrested on my way home from the Civil Jail and placed in the Tombs because of an alleged probation violation.

(b) I was subpoenaed to testify before a New York County grand jury, and I did so. When I testified truthfully and said nothing in contradiction to anything that the D.A. had earlier learned from the wiretap and eavesdrop tapes, thereby averting an indictment for perjury, the D.A. had me indicted on a frivolous charge of evasive answers, which indictment was later dismissed. This indictment came the same day I was to be released from probation on my state conviction -- April 19, 1976.

(c) When I obtained an order from the Supreme Court of New York County that the D.A. return to me my illegally seized records, the IRS promptly cooperated with the DA in thwarting that order by summonsing these same records directly at the DA's office and keeping them there, thereby continuing this major obstruction to my business.

26. This same pattern can be seen in the current investigation and grand jury proceeding involved in this case. I began to see signs of a renewed investigation and increased harassment just about the time that I was granted by the Hon. Charles L. Brieant, Jr., an evidentiary hearing in support of my motion for a new trial in the Belmont Franchising case. It became apparent in late 1975 that an extensive evidentiary hearing would be held, and such a hearing was indeed held in 1976. That hearing revealed extensive governmental interference with my rights, and it further revealed communication of tainted information from state authorities to federal prosecutorial authorities. This is spelled out in the transcript of that evidentiary hearing and, to some limited extent, in the opinion filed in the matter by Judge Brieant on June 4, 1976.

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I believe that the current investigation was initiated because the Federal Government feared that there was a substantial chance that I would eventually overturn my Belmont Franchising conviction in the Court of Appeals (where the case is now pending). At the time that the current investigation began, the evidentiary hearing had not yet taken place, but the Government was certainly aware of the extent to which the evidence at the hearing was going to show that the Belmont conviction was tainted Indeed, in a paper filed by the Government in the Belmont case on the proceedings on the motion for new trial, the Government lamented the possibility that its "hard won" conviction of Louis Ostrer might now be overturned. Thus, to guard against my being "let off the hook", the Government again took up its arms in an effort to lay me low and make it clear that there was no way out for me other than the route of cooperation and testimony.

27. I have lost an enormous amount of money as a result of these harassments. Friends and business associates have feared to be with or to deal with me, socially or financially. My reputation has been virtually destroyed, and every time I begin to try to rebuild my life, the pattern of harassment recommences. Unless this harassment is stopped, my life and career will doubtless reach the point of no return. No citizen can or should have to tolerate this degree of harassment from his own government in a free society dedicated to the rule of

law.

28. The Government clearly will stop at nothing to put me out of business and try to put me in prison, unless I cooperate. For example, the Government, including the Subcommittee, has tried to convey the impression that the fringe benefit plans that I have designed are somehow unlawful or unethical. However, nowhere has anyone from the Government or the Subcommittee or any other agency mentioned the fact that all of the plans designed for various unions have been submitted to the IRS for approval, and have been granted favorable determination letters.

29. Unless this harassment is stopped, my family will be destroyed. My son will probably be unable to join the Bar, either temporarily or perhaps permanently, all without just cause.

30. I am confident that at an evidentiary hearing, the aforesaid factual allegations will be proven to the satisfaction of the Court. I pray for such an evidentiary hearing and then for relief from the burdens and harassment cast upon me by the Government and by the Defendants in particular, and those working with them.

Louis C. Ostrer

Signed and sworn to before me on
this 3rd day of August 1976

Jeraldine Brandon
Notary Public

JERALDINE BRANDON
Notary Public, State of New York
No. 60-5425000 Westchester County
Certificate filed in New York County
Commission Expires March 30, 1976

My Commission Expires: ____________.

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EXHIBIT "A" TO AFFIDAVIT OF
LOUIS C. OSTRER

Letter from Austin V. Campriello, Assistant District Attorney to Louis C. Ostrer, dated July 23, 1974.

DISTRICT ATTORNEY
OF THE
COUNTY OF NEW YORK
155 LEONARD STREET
NEW YORK, N. Y. 10013
RECTOR 2-7300

RICHARD H. KUH
District Attorney

ADDRESS ANSWER TO THE DISTRICT ATTORNEY,
ATTENTION OF THE SIGNER OF THIS LETTER AND
REFER TO NUMBER________________

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July 23, 1974

Louis C. Ostrer
377 5th Avenue
New York, New York 10016

Dear Sir:

I am in receipt of your letter dated July 19, 1974, regarding the return of your property.

Please be advised that I am of the impression that, with the exception of a relatively minimal amount of material presented in evidence before various Grand Juries, all of your property was either returned to you via Mr. Kilroy or turned over to the Internal Revenue Service pursuant to summons.

Unfortunately Edward Gore, the accountant attached to our office in charge of the return of your property, is presently on vacation. I shall endeavor to have Mr. Gore recheck our files to ascertain what, if any records, remain in our possession, as soon as he returns.

Our internal check would be facilitated if you would specify those documents which you believe were seized by this office pursuant to court order but not returned.

Very truly yours,

Austin V. Campriello
Assistant District Attorney

AVC:dlp

cc: Wynn & Atlas
230 Park Avenue
New York, New York

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cc: Maurice Edelbaum, Esq.
230 Park Avenue
New York, New York

Edward I. Martin
Revenue Agent
120 Church Street
New York, New York

⑩

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EXHIBIT "B" TO AFFIDAVIT OF
LOUIS C. OSTRER

Cover page and pg. 39 of "Staff Study of the
Severance Pay - Life Insurance Plan of
Teamsters Local 295" (Permanent
Subcommittee on Investigations
of the Committee on Govern-
ment Operations (United
States Senate)

94th Congress }
2d Session }
COMMITTEE PRINT

1.38

STAFF STUDY

OF THE

SEVERANCE PAY-LIFE INSURANCE PLAN OF TEAMSTERS LOCAL 295

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES SENATE

JUN 11 1976

Printed for the use of the Committee on Government Operations

U.S. GOVERNMENT PRINTING OFFICE
71-642 WASHINGTON : 1976

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APPENDIX II

[From the Sunday News, Feb. 25, 1973]

SWINDLER MAKES 250G BAIL BUT STILL WINDS UP IN JAIL

(By Paul Meskil)

For financial finagler Louis C. Ostrer, it was a case of out of the frying pan, into the fire. Or, more specifically, out of Civil Jail and into the Tombs.

Ostrer, a convicted swindler whose pals include underworld bosses, wanted his freedom so much he put up $250,000 bail to get it. But it lasted only a few minutes. Rearrested for alleged violation of probation, he spent the weekend behind bars in the Tombs, Manhattan's House of Detention for Men.

His latest bout with the law began Thursday when he appeared in Manhattan Supreme Court as a material witness in a grand jury probe of organized crime. Assistant District Attorney John Fine asked Justice Jacob Grumet to hold Ostrer in $10 million bail because "his life is in danger."

"If this man is at large," Fine added, "I have no doubt that he will be killed."

He said the roly-poly Ostrer "has important information" about a mob plot "to assault and murder a certain person." Ostrer denied this.

"To say I have any knowledge of any wrongdoing is absurd," he insisted. "To say that my life is in danger is absurd."

Grumet set bail at $250,000 and sent Ostrer to Civil Jail until he could post the bond, which he did Friday. As he left the jail on W. 37th St., preparing to go home to 181 Kings Point Road in Great Neck, L.I., he was rearrested by officers bearing a warrant charging him with violating the terms of a 1969 probation agreement.

WAS "THE GREATEST"

In June 1969, Ostrer pleaded guilty of stealing, forging and cashing $338,370 worth of checks belonging to his employer, Canada Life Assurance Association of Toronto, which had once called him "the greatest insurance salesman on the continent."

Placing Ostrer on five years' probation, Manhattan Supreme Court Justice Xavier Riccobono had said: "It would appear that almost any venture you undertake, obviously because of those talents and gifts that have been given to you by the Almighty Himself, seems to enable you to convert almost anything into a very successful enterprise. It is inadvisable, under these circumstances, for the court to take these talents, these God-given talents, and incarcerate them by incarcerating you."

Last month, Ostrer and Mafia Mobster John (Johnny Dio) Dioguardi were convicted in Federal Court of conspiring to manipulate stocks. They were accused of plotting a $1 million stock swindle. They are to be sentenced March 13 and could get up to five years in prison.

At Thursday's court hearing, prosecutor Fine said Ostrer had information on big-time loan-sharking and was "indebted to known criminals" who run loan-shark operations and have more than $75 million "out on the street" on any given day.

APPENDIX III

U.S. GENERAL ACCOUNTING OFFICE, APRIL 13, 1973

OFFICE OF LEGISLATIVE LIAISON—ROGER SPERRY

REGIONAL MANAGER, NEW YORK—ALFONSO J. STRAZZULLO

(Review of Plans, Programs and Financial Transactions Relating to the Severance Benefit Trust Fund of Local 295 (Code 97518))

We have completed the additional work requested by the Permanent Senate Subcommittee on Investigations and the results are included in the attached workpaper summary.

To recap, our review was primarily concerned with determining whether the plan is adequately funded to protect the rank and file of the Local's membership. We have satisfied ourselves that the severance benefits paid were in accordance with the rules and regulations of the fund. In addition, we have also reviewed the life insurance benefits paid for deceased employees and again are satisfied that the rules and regulations of the fund were compiled with.

EXHIBIT "C" TO AFFIDAVIT OF
LOUIS C. OSTRER

Handwritten statement of Alex Krausz
dated July 5, 1975

5 July 1975

On July 1, 1975 I was at 120 Church Street at the offices of Special Investigator Ryan of the Internal Revenue Service pursuant to a request that I appear before him relative to an investigation concerning a certain Louis C. Ostrer and his family, who are customers of mine. The transactions that I have with the Ostrers are confined to the purchase by them of stamps.

I have on occasion sold stamps to the Ostrers and have also acted as agent for them on occasion where I purchased stamps for their use and also bid for stamps by auction.

On other occasions I have from time to time borrowed monies from the Ostrers and gave them dated checks for these advances. They have also paid me for stamps with dated checks that on certain times were returned due to insufficient funds requiring redeposit or redemption.

On this date I appeared at Mr Ryans office with my wife and it was on this date that Mr Ryan and an associate whos name is unknown to me questioned me rather extensively about my personal business rather than Mr Ostrer and his family. I became disturbed by his tactics and when I took exception to his tactics He told me that when someone like myself does business with people like "MR OSTRER IS LOOKING FOR TROUBLE" AND GET INVOLVED IN TROUBLE, Mr Ryan had occasion to meet me at my home on previous occasions. This meeting came as a very disturbing and distasteful session. I have done business with the OSTRERS for a period since 1919.

The statement on these two pages is true description

EXHIBIT "D" TO AFFIDAVIT OF

LOUIS C. OSTRER

Subpoenas and Summonses served by Federal Grand Juries and IRS for papers of Louis C. Ostrer's businesses.

Form No. USA-33s-21 (Rev. [illegible]) Grand Jury Subpoena Duces Tecum

United States District Court

SOUTHERN DISTRICT OF NEW YORK

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TO Viscount Agency Inc.
377 Park Ave.
New York, N. Y.

GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 3?03 in the United States Court-house, Foley Square, in the Borough of Manhattan, City of New York, on the 19th day of July, 1976, at 2:00 o'clock in the after noon, to testify and give evidence in regard to an alleged violation of Title 18, United States Code, Section 371

and not to depart the Court without leave thereof, or of the United States Attorney, and that you produce at the time and place aforesaid the following:

Books of original entry, including, but not limited to, cash receipts and disbursement journals, general ledgers, cancelled checks, bank statements, loan applications, corporate minute books and stock record books for the fiscal years ending:

4/30/70
4/30/71
4/30/72
4/30/73
4/30/74
4/30/75

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

DATED: NEW YORK, N. Y. July 7, 1976

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York.

Clerk.

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NOTE: *Report at Room* [illegible]. In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room [illegible], upon each day on which you attend Court as a witness.

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ALAN R. NAFTALIS
Special Attorney
U. S. Dept. of Justice
(212) 791-[illegible]

Room

DEPARTMENT OF JUSTICE
ORGANIZED CRIME & RACKETEERING SECTION
NEW YORK
1 ST. ANDREWS PLAZA

[illegible]

United States District Court

SOUTHERN DISTRICT OF NEW YORK

TO Modern Agency Inc.
377 Fifth Ave.
New York, N. Y.

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GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 1403 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 19th day of July, 1976, at 2:00 o'clock in the after noon, to testify and give evidence in regard to an alleged violation of Title 18, United States Code

and not to depart the Court without leave thereof, or of the United States Attorney, and that you produce at the time and place aforesaid the following:

Books of original entry, including but not limited to, cash receipts and disbursement journals, general ledgers, cancelled checks, bank statements, loan applications, corporate minute books and stock record books for the fiscal years ending:

4/30/70
4/30/71
4/30/72
4/30/73
4/30/74
4/30/75

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

DATED: NEW YORK, N. Y. July 7, 1976

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York.

Clerk.

NOTE: *Report at Room* ~~[illegible]~~ 767 In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room [illegible] 767 upon each day on which you attend Court as a witness.

ALAN R. NAFTALIS
[illegible] Special Attorney
U. S. Dept. of Justice
(212) 791-1156

Room DEPARTMENT OF JUSTICE
ORGANIZED CRIME & RACKETEERING SECTION
JOINT STRIKE FORCE
1 ST. ANDREWS PLAZA
3RD FLOOR
NEW YORK, NEW YORK 10007

Form No. USA-33s-221 (Rev. [illegible] 70)--Grand Jury Subpoena Duces Tecum

United States District Court
SOUTHERN DISTRICT OF NEW YORK

TO Fringe Programs Inc.
377 Fifth Ave.
New York, N. Y.

146

GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 1403 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 19th day of July, 1976, at 2:00 o'clock in the after noon, to testify and give evidence in regard to an alleged violation of Section 371, Title 18, United States Code

and not to depart the Court without leave thereof, or of the United States Attorney, and that you produce at the time and place aforesaid the following:

Books of original entry, including but not limited to, cash receipts and disbursement journals, general ledgers, cancelled checks, bank statements, loan applications, corporate minute books and stock record books for the fiscal years ending:

11/30/70
11/30/71
11/30/72
11/30/73

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

DATED: NEW YORK, N. Y. July 7, 1976

Robert B Fiske Jr.

ROBERT B. FISKE JR.
United States Attorney for the Southern District of New York.

Raymond F. [illegible] Clerk.

767

NOTE: *Report at Room* ~~[illegible]~~. In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room ~~[illegible]~~ upon each day on which you attend Court as a witness.
767

ALAN R. NAFTALIS
~~Assistant~~ Special Attorney
U. ~~S.~~ Dept. of Justice
(212) 791-1156

Room DEPARTMENT OF JUSTICE
ORGANIZED CRIME & RACKETEERING SECTION
JOINT STRIKE FORCE
1 ST. ANDREWS PLAZA
3RD FLOOR
NEW YORK, NEW YORK 10007

[illegible] Grand Jury Subpoena Duc. Tecum

United States District Court

SOUTHERN DISTRICT OF NEW YORK

147

TO American Service Industries
377 Park Ave.
New York, N. Y.

GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 1403 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 19th day of July, 1976, at 2:00 o'clock in the after noon, to testify and give evidence in regard to an alleged violation of Title 18, United States Code, Section 371

and not to depart the Court without leave thereof, or of the United States Attorney, and that you produce at the time and place aforesaid the following:

Books of original entry, including but not limited to. cash receipts and disbursement journals, general ledgers, cancelled checks, bank statements, loan applications, corporate minute books and stock record books for the fiscal years ending:

4/30/72
4/30/73
4/30/74
4/30/75

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

DATED: NEW YORK, N. Y. July 7, 1976

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York.

Clerk.

767
NOTE: *Report at Room* [illegible] In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room [illegible] upon each day on which you attend Court as a witness.
767

ALAN R. NAFTALIS
[illegible] Special Attorney
U. S. Dept. of Justice
(212) 791-1156

Room

DEPARTMENT OF JUSTICE
ORGANIZED CRIME & RACKETEERING SECTION
JOINT STRIKE FORCE
1 ST. ANDREWS PLAZA
3RD FLOOR
NEW YORK, NEW YORK 10007

AO Form No. 110 (Rev. 5-68) Subpoena to Testify Before Grand Jury

United States District Court

FOR THE

148

EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Served
6/30

To Fringe Programs, Inc.
c/o Dina Gelman

You are hereby commanded to appear in the United States District Court for the Eastern

District of Michigan at Room 457 Federal Building, in the city of

Detroit on the 7th day of July 1976 at 10:00 o'clock A.M. to

testify before the Grand Jury and bring with you[1] All ledgers, books, and records of account of Fringe Programs, Inc. for the period April 1, 1970 to July 1, 1973. All correspondence, memoranda, proposals, and memoranda of agreements between Fringe Programs, Inc. and Fringe Programs of Michigan, or Verone Gropman and Stuart Sinai from September, 1969 to January 1, 1974. All correspondence, proposals, and memoranda of agreements pertaining to the Local 299 Severance Trust Fund, the Local 299 Officers and Business Agents Severance Pay Plan, and the International Brotherhood of Teamsters, from September, 1969 to January 1, 1974; and any and all correspondence or memoranda of agreement with or on behalf of Donald E. Fitzsimmons from September, 1969 to January 1, 1974.

This subpoena is issued on application of the United States of America.

Mr. Geoffrey A. Anderson, Special Attorney
Detroit Strike Force
United States Department of Justice
940 Federal Building
Detroit, Michigan 48226
(Telephone: 313-226-7252)

Clerk.

Date June 24, 1976.

By. Deputy Clerk.

---

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN

Received this subpoena at on
and on at I served it on the
within named
by delivering a copy to and tendering[2] to the fee for one day's attendance and the mileage
allowed by law.

Date , 19 By

Service Fees
Travel $
Services
Total $

---

[2] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof, 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

Anderson/Hagan/ew

AO Form No. 110 (Rev. 5-68) Subpoena to Testify Before Grand Jury

United States District Court

FOR THE

EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

149

To Viscount Agency, Inc.
c/o Seymour Greenfield, President

You are hereby commanded to appear in the United States District Court for the Eastern District of Michigan at Room 457 Federal Building in the city of Detroit on the 7th day of July 1976 at 10:00 o'clock A. M. to testify before the Grand Jury and bring with you[1] all ledgers, books and records of account of Viscount Agency, Inc. for the period April 1, 1970 to January 1, 1974. Any and all correspondence, memoranda of agreements, proposals, between Viscount Agency, Inc. and the following companies and/or individuals for the period September 1, 1969 to January 1, 1974:

Fringe Programs, Inc.
Scota Agency, Inc.
Fringe Programs of Michigan
Manhattan Life Ins. Co. of New York
Donald E. Fitzsimmons
Richard F. Fitzsimmons

Verone Gropman
Stuart Sinai
Teamsters Local 299 Severance Trust Fund
Teamsters Local 299 Officers and Business Agents Severance Pay Plan -- I.B.T.
Tony Sciarrotta

This subpoena is issued on application of the United States of America.

Mr. Geoffrey A. Anderson, Special Attorney
Detroit Strike Force
United States Department of Justice
940 Federal Building
Detroit, Michigan 48226
(Telephone: 313-226-7252)

StAN Hunterton

Clerk.

Date June 24, 1976

By ....
Deputy Clerk.

---

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN

Received this subpoena at on and on at I served it on the within named by delivering a copy to and tendering[2] to the fee for one day's attendance and the mileage allowed by law.

Date ...., 19........

....

By ....

Service Fees
Travel .... $
Services ....
Total .... $

---

[2] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

Hagan/Anderson/ew

Before Grand Jury

United States District Court
FOR THE
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

150

To Fringe Programs, Inc.
c/o Louis C. Ostrer, Consultant

You are hereby commanded to appear in the United States District Court for the Eastern District of Michigan at Room 457 Federal Building in the city of Detroit on the 7th day of July 1976 at 10:00 o'clock A. M. to

tify before the Grand Jury and bring with you' all ledgers, books, and records of account of
ringe Programs, Inc. for the period April 1, 1970 to July 1, 1973. All correspondence,
oranda, proposals, and memoranda of agreements between Fringe Programs, Inc. and
ringe Programs of Michigan, or Verone Gropman and Stuart Sinai from September, 1969
o January 1, 1974. All correspondence, proposals, and memoranda of agreements per-
ining to Local 299 Severance Trust Fund, the Local 299 Officers and Business
Agents Severance Pay Plan, and the International Brotherhood of Teamsters, from
ptember, 1969 to January 1, 1974; and any and all correspondence or memoranda of
reement with or on behalf of Donald E. Fitzsimmons from September, 1969, to January 1,
1974

[illegible] Building
Detroit, Michigan 48226
(Telephone: 313-2267252)
Date June 24, 1976

STAN HUNTERTON
Clerk.

By
Deputy Clerk.

---

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN

15!

Received this subpoena at on
and on at I served it on the
within named
by delivering a copy to and tendering* to the fee for one day's attendance and the mileage
allowed by law.

Date , 19

By

Service Fees
Travel $
Services
Total $

---

* Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

Ragan//Anderson/ew

Form 2039-A
(Rev. 2-74)

Summons

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

INTELLIGENCE DIVISION

EDMOND C. WYBAILLE III
SPECIAL AGENT

120 CHURCH STREET
NEW YORK, NEW YORK 10007

212-264-3780

In the matter of the tax liability of

SEYMOUR GREENFIELD

alw (Rin) 152

Internal Revenue District of Manhattan

Period(s) 1970 - 1973

The Commissioner of Internal Revenue

To Ben Wolf

At 277 Park Avenue N.Y. N.Y.

Greetings: You are hereby summoned and required to appear before Edmond C. Wybaille III, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

All records pertaining to the preparation of the tax returns forms 1040 for the above captioned taxpayer for the period 1970 through 1973 including but not limited to:

1. W2
2. 1099
3. Bank statements & cancelled checks
4. Broker statements, purchases, buys & sells
5. Accountants workpapers.

Place and time for appearance:

at 120 Church Street N.Y. N.Y.

on the [illegible] day of July, 1975 at 9 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this [illegible] day of July, 1975

Attested Copy

Signature ____________ Title ____________

(264-3755)

Form 2039-A (Rev. 2-74)

(Rev. Oct. 1969)

Summons

Internal Revenue Service
P.O. Box 3159
Church Street Station
New York, N.Y. 10008

In the matter of the tax liability of
Louis C. Ostrer and Rita M. Ostrer,
181 Kings Point Road
Kings Point, N.Y. 11024

ternal Revenue District of Manhattan

153

eriod(s) 1970 and 1971

The Commissioner of Internal Revenue

o District Attorney's Office
New York County
At Attn: Assistant District Attorney Austin Campriello
155 Leonard St., New York, N.Y.

Greetings: You are hereby summoned and required to appear before Edward I. Martin an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

The records of Louis C. Ostrer and Rita M. Ostrer, and their associated corporations, per attached schedule of said corporations.

Place and time for appearance:

120 Church St., New York, N.Y. 10008 - 3rd floor

the 30th day of November, 19 73 at 10:00 o'clock A.M.

ailure to comply with this summons will render you liable to proceedings in the district court of the United States or before United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

ssued under authority of the Internal Revenue Code

s 8TH day of NOVEMBER, 19 73

Attested Copy Edward I. Martin
Signature

Internal Revenue Agent
Title

Form 2039-A (Rev. 10-69)

Internal Revenue Code

Sec. 7602

Examination of Books and Witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Sec. 6420

Gasoline Used on Farms

* * *

([illegible]) Applicable Laws—

* * *

([illegible]) Examination of books and witnesses.—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

* * *

Sec. 6421

Gasoline Used for Certain Nonhighway Purposes or by Local Transit Systems

* * *

([illegible]) Applicable Laws—

* * *

([illegible]) Examination of books and witnesses.—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

* * *

Sec. 6424

Lubricating Oil Not Used in Highway Motor Vehicles

* * *

(d) Applicable Laws—

* * *

(2) Examination of Books and Witnesses.—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

* * *

Sec. 7605

Time and Place of Examination

(a) Time and place.—The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), 6424 (d)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421(f) (2), or 6424(d)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

* * *

Sec. 7603

Service of Summons

A summons issued under section 6420 (e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Sec. 7604

Enforcement of Summons

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner[1] for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner[1] to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner[1] shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * *

Sec. 7210

Failure To Obey Summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e)(2), 6421(f)(2), 6424 (d)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

---

[1] Or United States magistrate, pursuant to P.L. 90-578.

Associated Corporations of Louis C. Ostrer

Argyle Agency Inc.
American Truck Service Club, Inc.
BMS Agency Inc.
Citizens Factors Corp.
Darren, Alden Co., Inc.
Europa Fashions Ltd.
Executive Affiliates Inc.
Fringe Programs Inc.
Homer Agency Inc.
International Fashions Inc.
J.N.S. Factoring Corp.
Louis C. Ostrer Associates Inc.
Marquis Agency Inc.
Migdal Agency Inc.
Modern Agency Inc.
Robert Agency Inc.
SMB Agency Inc.
Sportsmen's Brokerage Inc.
Stratton Agency, Ltd.
Summit Agency Inc.
Sutter Agency Inc.
Trans-World Chemical Corp.
Viscount Agency Inc.
Dina Gelman Agency
Sutton Agency Inc.
Standard Ltd. Inc.
Lincoln Affiliates

In the matter of the tax liability of [illegible]
131 Kings Point Road
Kings Point, New York 11024

Internal [illegible]
P.O. Box [illegible]
Church Street Station
New York, N.Y. 10 3

Tel. [illegible] 264-3666

Internal Revenue District of Manhattan

156

Period(s) 1971, 1972 & 1973

The Commissioner of Internal Revenue

To Insurance Dept. of New York State

At 2 World Trade Center, New York, N.Y.
Attn: Mr. Sidney B. Glaser, Associate Counsel, Welfare Funds

Greetings: You are hereby summoned and required to appear before Revenue Agent, E.J. Martin an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection o the tax liability of the above named person for the period(s) designated and to bring with you and produce fo examination the following books, records, and papers a the place and time hereinafter set forth:

1) Copies of annual statements of Local 295 for FYE 6-30-71, 6-30-72, 6-30-73 and 6-30-74.
2) Copies of annual statements of any other teamsters locals severance funds that are associated with Louis C. Ostrer.
3) Report of examination of Local 295 severance fund as of 6-30-71.
4) Amount of commission paid by Executive Life Insurance Co., and Transworld Life Insurance Co., for policies written for severance funds for identified locals of items 1 and 2 above.
5) Request for examination and/or inspection of administrative files, Re: Louis C. Ostrer, Dina Gelman and all associated individuals and corporations.

Place and time for appearance:

at 120 Church Street, New York, N.Y. 10008 3rd Floor

on the 25th day of February, 19 75 at 10:00 o'clock A.M

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this 3rd day of February, 19 75

Attested Copy Edward J. Martin Internal Revenue Agent
Signature Title

Form 2039A (Rev. 2-74)

To Mr. Higgins DATE February 11, 1975

From Mr. Glaser

Subject Summons of the Internal Revenue Service (IRS) of the U.S. Department of the Treasury concerning Louis C. Ostrer

157

Reference is made to our discussion concerning the request of the IRS for this Department's cooperation in their investigation of Louis C. Ostrer. Attached is the summons served on the Department by that Agency.

Deputy Superintendent Nuccio whose signature is affixed below has approved full cooperation and it is understood that Examiner Zaroff will be assigned to work with the IRS representatives.

SBG:ar
cc: Supt. Schenck
Messrs. Monin
Gemma
Nuccio
G. Gould
Perla
Legal File
SBG File

Sidney B. Glaser
Sidney B. Glaser
Associate Counsel, Welfare Funds

Approved By:
SIGNED
Sal Nuccio
Deputy Superintendent of Insurance

Form 549. 10-21-69-50M (RD1-314)

Excerpts From the Internal Revenue Code

158

Sec. 7602

Examination of Books and Witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary of his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Sec. 6420

Gasoline Used on Farms

* * *

(e) Applicable Laws—

* *

(2) Examination of books and witnesses.—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for the tax.

* *

Sec. 6421

Gasoline Used for Certain Non-highway Purposes or by Local Transit Systems

* * *

(f) Applicable Laws—

* * *

(2) Examination of books and witnesses.—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

Sec. 6424

Lubricating Oil Not Used in Highway Motor Vehicles

* * *

(d) Applicable Laws—

* * *

(2) Examination of books and witnesses.—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

* * *

Sec. 7605

Time and Place of Examination

(a) Time and place.—The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 6427(e)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

* * *

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty

Sec. 7604

Enforcement of Summons

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner[1] for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner[1] to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner[1] shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

---

[1] Or United States magistrate, pursuant to P.L. 90-578.

Sec. 7210

Failure To Obey Summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(c)(3), 6421(f)(2), 6424(d)(2), 6427(e)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with cost of prosecution

U.S. GPO: 1974-536-004/5104

Form No. USA-33s-224 (Rev. 10-14-60)—Grand Jury Subpoena Duces Tecum

United States District Court

SOUTHERN DISTRICT OF NEW YORK

TO Fringe Programs Inc., Successors & Assigns
377 Fifth Avenue
New York, N. Y.

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GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 1403 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 12th day of July 1976, at 2 o'clock in the after noon, to testify and give evidence in regard to an alleged violation of 18 USC 371

and not to depart the Court without leave thereof, or of the United States Attorney, and that you produce at the time and place aforesaid the following: Any and all documents, books of account and records in your possession relating to: Local 732, Airline, Aerospace and Affiliates Employees Severance Fund; Local 447, Severance Bonus Trust Fund; Local 295, Severance Trust Fund for the period 1967 to present, including, but not limited to, contracts, agreements, records, all books of account, memoranda, billings, insurance policies, claims correspondence, communications, minutes, ledgers, cash receipts and disbursements books, journals, check stubs, paid bills, records and accounts of all participants, with supporting work papers and records of disbursing of claims. Also, all payroll records of Fringe Programs, Inc., Successors and Assigns for the same period.

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

DATED: NEW YORK, N. Y. June 16, 1976

Robert B. Fiske Jr.

United States Attorney for the
Southern District of New York.

Raymond F. Clerk.

NOTE: *Report at Room 413.* In order to secure your witness fees and mileage, it is necessary that you retain this Subpeona and present the same at the United States Attorney's Office, Room 413, upon each day on which you attend Court as a witness.

~~Assistant~~ Special Attorney
Alan R. Naftalis
Phone: 791-1157

Room

DEPARTMENT OF JUSTICE
ORGANIZED CRIME & RACKETEERING SECTION
JOINT STRIKE FORCE
1 ST. ANDREWS PLAZA
3D FLOOR
NEW YORK, NEW YORK 10007

FPI MI—6-13-69-15M-3840

United States District Court

SOUTHERN DISTRICT OF NEW YORK

RECEIVED
MAY 12
INSURANCE
STATE OF

TO Thomas A. Harnett, Superintendent of Insurance
State of New York
Insurance Department
Two World Trade Center
New York, New York 10047

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GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 1403 in the United States Court-house, Foley Square, in the Borough of Manhattan, City of New York, on the 19th day of May 1976, at 10:00 o'clock in the Fore noon, to testify and give evidence in regard to an alleged violation of 18 U.S.C. 1954.

and not to depart the Court without leave thereof, or of the United States Attorney, and that you produce at the time and place aforesaid the following:

Any and all documentary material in your possession including, but not limited to, examination reports and supporting work papers, annual statements and all other filings and correspondence of the severance funds of Locals 295, 447, and 732 for th years 1967 to date.

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

DATED: NEW YORK, N. Y. May 11, 1976

DEPARTMENT OF JUSTICE
ORGANIZED CRIME & RACKETEERING SECTION
JOINT STRIKE FORCE
1 ST. ANDREWS PLAZA
3RD FLOOR
NEW YORK, NEW YORK 10007, Phone 791-1156

Raymond F. Burghardt
Clerk.

Robert B. Fiske, Jr.
United States Attorney for the
Southern District of New York.

Robert B. Fiske, Jr.

NOTE: *Report at Room 450.* In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room 450, upon each day on which you attend Court as a witness.

~~Assistant~~ Special Attorney
Allen R. Naftalis
Phone #791, 1156, 1157

Room

[illegible] SECTION
[illegible] PLAZA
NEW YORK, NEW YORK 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

LOUIS C. OSTRER,
RITA OSTRER,
JACK OSTRER, and
DINA GELMAN,

Plaintiffs,

-against-

WILLIAM I. ARONWALD,
ROBERT B. FISKE, JR.,
ALAN NAFTALIS,
MARVIN SONTAG,
JAMES KILLEEN,
EDWARD H. LEVI, and
THE UNITED STATES OF AMERICA,

Defendants.

---------------------------------------x

Civil Action
No.__________

AFFIDAVIT

AFFIDAVIT OF HARVEY A. SILVERGLATE

HARVEY A. SILVERGLATE, being first duly sworn according to law, deposes and says:

1. I am Harvey A. Silverglate, a member of the Bars of the Supreme Judicial Court of Massachusetts, the United States District Court for the District of Massachusetts, the United States Courts of Appeals for the First and Second Circuits, and the Supreme Court of the United States.

2. I make this affidavit in connection with a civil action filed by Louis C. Ostrer and members of his family

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against certain government officials and the United States of America.

3. I have reason to believe that the threatened prosecutions against Louis C. Ostrer and members of his family as well as business associates, are being brought solely in order to induce and coerce Louis C. Ostrer into giving information and testimony about persons he knows or has known and persons with whom he does or has done business, as well as others, which information and testimony would have to conform to Government expectations and needs. In the event such information and testimony so conform, Louis Ostrer, but more particularly the members of his family, will be able to escape indictment and prosecution.

4. I attended a meeting begining at approximately 2:00 p.m. on Friday, June 11, 1976, held at the offices of the Federal Organized Crime Strike Force, One St. Andrew's Plaza, Manhattan. Attending that meeting in addition to myself were Alan Dershowitz, Esquire (counsel for Louis C. Ostrer), Richard Wynn, Esquire (counsel, along with his partner, for other members of the Ostrer family), William I. Aronwald, Esquire (head of the Organized Crime Strike Force for the Southern District of New York), Marvin Sontag (an investigator with the Internal Revenue Service and member of the Strike Force), James Killeen (an investigator with the Internal Revenue Service and member of the Strike Force), and Alan

Naftalis, Esquire (an attorney with the Strike Force in immediate charge of the Ostrer investigations).

5. Mr. Dershowitz and I stated that Louis Ostrer was concerned with the prospective indictments against him and members of his family. I indicated, in particular, that Benjamin Ostrer, the eldest of Louis Ostrer's three sons, had just graduated law school and was preparing for his application for admission to the New York Bar. Mr. Aronwald stated that he felt that under rules of the Character Committee, an indictment against Benjamin could cause him problems in terms of a delay, or even a disqualification, in his effort to become a member of the Bar. Mr. Sontag expressed the view that it seems terribly "unfair" that even an indictment followed by an acquittal might be enough to keep Benjamin from being admitted to the Bar, but Messrs. Aronwald and Naftalis assured Mr. Sontag and the others present that such might indeed be the case in New York. Mr. Dershowitz and I stated that we agreed that such might be the case, and that this situation was foremost on the mind of Louis Ostrer.

6. I further noted the fact that all of this talk of a new prosecution of Louis Ostrer came at a time when he had filed and was strenously litigating a new trial motion with respect to his conviction in the Belmont Franchising Corporation stock manipulation case, United States v. Louis Ostrer, No. 71-CR-558 (U.S.D.C., S.D.N.Y.) I noted, however, that just a few days prior to the meeting, the Hon. Charles L.

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Brieant, Jr., a Judge of this Court, denied the new trial motion in a long opinion, and that the denial was being appealed by Louis Ostrer.

7. At first, the Strike Force members present at the meeting would not be specific as to the targets of the new grand jury probe. They said simply that "Louis Ostrer and members of his family and business associates" were targets. Upon being pressed by the defense attorneys present for more details, the Strike Force members nodded affirmatively upon the mention of the names of Louis Ostrer, Rita Ostrer, Benjamin Ostrer, Dina Gelman, and Jack Ostrer. They said that the crimes involved were "tax violations". Later, they became more specific and said that members of the Ostrer family were suspected of both evading their own taxes and being "deeply" involved in a conspiracy to help Louis Ostrer evade taxes. Mr. Killeen stated that the information that the Strike Force had put together had put all of the suspects "deeply" into the conspiracy. Mr. Sontag said that in its present posture, the investigation produced proof that Louis Ostrer "earned" money on which he did not pay taxes, with some of his money having been transferred to members of the Ostrer family. Thus, as things now stand, said Mr. Sontag, the Strike Force and the I.R.S. consider the family members as having earned the money given to them by Louis Ostrer, although, he admitted, the Strike Force recognizes "the

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possibility" that Louis Ostrer or someone else might testify that these family members at some point gave the money back to Louis Ostrer. At any rate, concluded Mr. Sontag, whoever ended up with the money would be the one guilty of the substantive crime of tax evasion, although the family members who passed the money back and forth would be guilty of either aiding and abetting Louis Ostrer's tax evasion, or of conspiracy to evade Louis Ostrer's income taxes.

8. Richard Wynn then asked the Strike Force members if they had any evidence that the money was "earned" rather than "borrowed" money, and Mr. Sontag said that he had evidence that it was earned. Mr. Killeen interjected that "not even Louis Ostrer" could have borrowed such large amounts of money, since it added up to "hundreds of thousands of dollars". Mr. Wynn countered by noting that Louis Ostrer had indeed borrowed extraordinarily large sums of money, that this was verified from the wiretaps and from Ostrer's grand jury testimony before the New York Supreme Court grand jury, and that the Strike Force members knew that this was so. Mr. Sontag did not deny the possibility that the money involved was borrowed, but instead of indicating that Louis Ostrer could have an opportunity to provide proof to the Task Force, or even to the Grand Jury to the effect that the money was either borrowed or otherwise not "earned income" on which taxes should have been paid, Mr. Sontag invited Ostrer to testify instead that

he had borrowed a lot of money "from Fat Tony" [i.e., Anthony Salerno, a person suspected by the Task Force of being involved with "organized crime" and a major target of the Strike Force] and had paid "Fat Tony" a lot of "vig" [short for "vigorish", slang for usurious interest]. Such testimony, stated Mr. Sontag, "would be fine." It thus became clear that the Strike Force would not even give Louis Ostrer an opprotunity to offer explanations to counter any suspicion or claim that he and his family members were involved in tax evasion. The Strike Force would accept only an explanation that would have the effect of providing evidence and testimony incriminating against targets of the Strike Force.

9. I asked what it was that the Strike Force wanted from Louis Ostrer and from his family members. Mr. Aronwald said that they wanted evidence and then testimony against "certain persons". Mr. Aronwald said that Louis Ostrer has for years dealt with "labor racketeers" and "organized crime figures", and the Strike Force wanted to know all that Louis Ostrer knows about the illegal activities of such persons. Mr. Sontag indicated that they know that Louis Ostrer must have paid bribes and kickbacks to labor officials in return forgetting labor union business, and the Strike Force wanted information and cooperation along these lines. Mr. Dershowitz and I then asked them to be more specific. Mr. Aronwald said simply that members of the Ostrer family were suspected

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of violations of the revenue laws, notably Title 26, United States Code, Sections 7201 and 7206. However, said Mr. Aronwald, the persons against whom the Strike Force wants testimony are suspected of committing crimes such as extortion, kickbacks to union officials, violations of the Taft-Hartley Act, "RICO" (racketeering) violations, and tax evasion. Mr. Aronwald said that the Strike Force would indict on whatever it could, especially on the more serious "RICO" charges which would result not only in long sentences, but also in permanent disbarrment of "these corrupt union officials" from holding union office.

10. Mr. Sontag volunteered at the beginning of this meeting that the Task Force was not planning to indict the family members in order to "punish" Louis Ostrer. But Mr. Aronwald later clarified this point by noting that if Louis Ostrer has information -- and they "know" that he indeed has information -- and would be willing to testify, and if other family members have information and would be willing to testify, they would then make a decision as to which ones were actually necessary as witnesses, and they would try not to use the family members. Mr. Aronwald said clearly, however, that Louis Ostrer had information they wanted, and that he was absolutely essential as a witness, and while any other members of the family who also happened to have information would have to divulge it as well, it was nevertheless Louis

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Ostrer's information that was essential. He stated categorically that cooperation by Louis Ostrer would "wash" other family members "out of the case" and that such family members could thereby avoid indictment entirely.

11. Mr. Sontag urged Louis Ostrer to make his decision to cooperate rather quickly, for if someone else comes along who could provide the information and testimony sought by the Strike Force, and if they no longer needed Louis Ostrer, then there would be no deals. "It's our job to send as many to jail as possible," said Mr. Sontag. But Mr. Sontag then clarified somwhat by responding to one of my questions. I asked what the indictment status was for all the family members involved, and Mr. Sontag responded that the I.R.S. had recommended against the indictment of Benjamin Ostrer, but had recommended in favor of the prosecution of Louis Ostrer, his father, his wife, his sister Dina Gelman, and other business associates. At this point, Mr. Aronwald appeared visibly upset, and he interjected himself into the discussion and stated that while it was true that the I.R.S. had recommended against indictment of Benjamin, nevertheless this was done at a "preliminary" point in the investigation, and that the Strike Force was trying to turn up evidence against Benjamin in the grand jury proceedings. Both Aronwald and Killeen added that

the grand jury investigation "might" get Benjamin indicted, although he could not say anything more certain at that point in time. It thus appeared clear to me that Messrs. Aronwald and Killeen were desperately trying to erase the impression created by Mr. Sontag that they really had nothing incriminating against Benjamin Ostrer, but it was equally clear from how Messrs. Aronwald and Killeen hedged their statements that even with the grand jury investigation quite far along, they still did not have enough in good faith to indict Benjamin, notwithstanding Messrs. Killeen's and Aronwald's efforts to create an opposite impression. It was equally clear, however, that they would stretch to get Benjamin indicted if necessary, to use him as a "bargaining chip" with his father.

12. I then asked whom the Strike Force was really interested in, and whether the Strike Force would really want Louis Ostrer to testify against the targets on the more serious suspected crimes. Mr. Aronwald would not name the targets (although at one point Mr. Sontag mentioned Harry Davidoff, Henry Brown, Anthony Salerno and others), but he said that the Strike Force wanted to "debrief Louis Ostrer" and learn everything that he knows about labor racketeering and organized crime. Mr. Aronwald said that the Government would offer Louis Ostrer whatever protection it could in the event he cooperated.

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13. Mr. Dershowitz then asked the following question: What if, instead of Louis Ostrer's testifying as to what he knows, other family members instead would testify as to what they know. Since Louis Ostrer would not testify, however, and since it was unlikely that the other family members (even if they testified) would be targets of retribution from those against whom they would testify, then all of the family members would be safe from retribution. Would this be sufficient, asked Mr. Dershowitz, in order to enable the other family members (other than Louis Ostrer) from being indicted? Mr. Aronwald said absolutely not. He said that Louis Ostrer's testimony was an absolutely essential part of any "deal". Louis Ostrer's testimony could get the whole family out of the case, he said, while the testimony of everyone except Louis Ostrer could get none of them out.

14. Mr. Aronwald said that they would not indict any of the Ostrer family during the month of June, and that he would give defense counsel notice "within a reasonable time" before indicting, to give Louis Ostrer an opportunity to avert the indictments by cooperating.

15. At another point in the discussion, Mr. Sontag mentioned an investigation into some "deal" in Buffalo in which Benjamin Ostrer had been involved. He said that the IRS did not recommend indictment of Benjamin as a result of that deal, but he said that Benjamin remained, nevertheless, a target of

the grand jury.

16. Defense counsel tried time and again to extract from the Strike Force members some details as to what it was claimed that the Ostrer family members had done that was criminal. At no time would they describe the details of the criminal acts or of the evidence. The only additional piece of information offered by Mr. Sontag was that Louis Ostrer appeared to have borrowed more money than he needed to live, and has hidden money to avoid paying taxes. He offered no details.

17. I then asked Mr. Aronwald whether or not the Strike Force would be able to do anything -- assuming a deal were struck -- toward getting Louis Ostrer a favorable ruling on his pending Rule 35 motion for reduction of sentence in the Belmont Franchising stock manipulation case. Mr. Aronwald said that he was aware of the pending motion (thereby contradicting his claim made earlier in the meeting that he knew nothing of the proceedings in the Belmont case because he was trying to steer his investigation clear of the information uncovered by prior "tainted" investigations); he stated that in the event of cooperation by Ostrer, the Strike Force would in advance talk to the United States Attorney and try to arrange something whereby the Government would at least bring to the Court's attention Louis Ostrer's cooperation, and perhaps the Government would not oppose the Rule 35 motion. Mr. Aronwald also said that if Louis Ostrer had to serve some time, they

might be able to do something concerning where he would serve.

18. I said to Mr. Aronwald at one point during the meeting that it was important to Louis Ostrer that Benjamin not be indicted. Mr. Aronwald said that he understood this, and he assured me that if a deal were struck between the Government and Louis Ostrer whereby Louis Ostrer would cooperate and testify, then Benjamin Ostrer would not be indicted.

19. During the course of the meeting, I asked if Benjamin Ostrer might agree to testify to everything he knows, without his father's testifying, would this prevent Benjamin's indictment. Mr. Sontag responded that it was Louis Ostrer, and not Benjamin Ostrer who had the information that they wanted. Mr. Sontag said that Louis Ostrer did not allow Benjamin to deal directly with the targets of the Strike Force prosecutorial effort, but instead Louis Ostrer himself dealt with "the Fat Tonies" and "Charlie Crooked Nose" and the other racketeers and organized criminals. At no time did the Strike Force members request that Benjamin Ostrer, or any other member of the family, give testimony against Louis Ostrer. All of this would seem to prove that the Strike Force is not really interested in convicting Louis Ostrer. They are interested only in testimony against Louis Ostrer's suspected associates.

Harvey A. Silverglate

Signed and sworn to before me on
this [illegible] day of July, 1976.

Notary Public
my commission expires [illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

LOUIS C. OSTRER,
RITA OSTRER,
JACK OSTRER, and
DINA GELMAN,

Plaintiffs,

-against-

WILLIAM I. ARONWALD
ROBERT B. FISKE, JR.,
ALAN NAFTALIS,
MARVIN SONTAG,
JAMES KILLEEN,
EDWARD H. LEVI, and
THE UNITED STATES OF AMERICA,

Defendants.

---------------------------------------x

Civil Action
No.__________

AFFIDAVIT

AFFIDAVIT OF ALAN DERSHOWITZ

ALAN DERSHOWITZ, being first duly sworn according to law, deposes and says:

1. I am Alan Dershowitz, a member of the Bar of the Supreme Judicial Court of Massachusetts, the United States District Court for the District of Massachusetts, the United States Courts of Appeal for the First and Second Circuits, and the Supreme Court of the United States.

2. I make this affidavit in connection with a civil action filed by Louis C. Ostrer and members of his family

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against certain government officials and the United States. I am currently, and have been for some time, legal counsel to Louis Ostrer.

3. I attended a meeting at the offices of the Organized Crime Strike Force for the Southern District of New York on Friday, June 11, 1976, to discuss with members of the Strike Force the possible indictment of Louis Ostrer and members of his family, including his wife Rita, his father Jack, his son Benjamin, and his sister Dina Gelman. The details of this meeting have been set forth by Attorney Harvey A. Silverglate in his affidavit filed in this action.

4. As a follow up to the aforesaid June 11th meeting, I telephoned Strike Force Attorney Alan Naftalis on July 1, 1976, to report to him the status of Louis Ostrer's situation.

5. Mr. Naftalis stated clearly and unequivocally during this telephone conversation that if Louis Ostrer was willing to come forward and cooperate, Naftalis would communicate this to his boss, William I. Aronwald, and would recommend that Benjamin not be indicted. He said that he was confident that in such circumstances, Mr. Aronwald would agree and would "not go forward" and indict Benjamin. He reiterated that it was Louis Ostrer in which the Strike Force was interested, because Louis Ostrer was involved with a lot of Teamsters Union people and was connected with the funds that have been the subject of pressure by the press. He said that if Louis Ostrer

were to do the sensible thing, he (Louis Ostrer) could thereby prevent the indictment of his son Benjamin. He said that in practical terms, Benjamin would be cut loose if Louis cooperated and that the Government does that all the time, such as cutting a wife loose when a husband cooperates.

6. I then asked Mr. Naftalis how much time we had, and he said he would get back to me before the end of July (1976) and he could assure me that there would be no indictment before then.

7. Shortly thereafter, at around 4:00 p.m. that same day, Mr. Naftalis telephoned me back and told me that Mr. Aronwald had instructed him to say to me that the Strike Force would not wait until August 1, 1976, to get an indictment, and that Louis Ostrer had already had time enough to make a decision. However, said Mr. Naftalis, there certainly would be no indictment for at least two weeks, and he agreed to see me on July 15, 1976, after saying he could not see me on July 14th because that was a busy grand jury day in this very case. I told him that by July 15th I would have a better sense of our situation.

8. Furthermore, on July 14, 1976, I had occasion to have another telephone conversation with Mr. Aronwald concerning a matter that I shall describe, infra.

9. I was in the United States Courthouse in Manhattan on July 14, 1976, in order to observe the attorney for William J. Kilroy, Nancy Rosner, Esquire, argue a motion to quash a subpoena, before the Hon. Robert J. Ward, U.S.D.J. Mr. Kilroy was an employee of Louis C. Ostrer or of corporations with

which Ostrer was connected, during the period that Ostrer's offices were under unlawful electronic surveillance and were unlawfully searched. Mr. Kilroy was seeking to quash a subpoena ordering him to testify before the grand jury, on the ground that the Government learned of Kilroy by tainted means. On that day I handed to Ms. Rosner several memoranda and drafts of documents and papers that I and my associates had prepared in contemplation of possible legal action to protect the rights of Louis Ostrer and certain members of his family in this same grand jury and related proceedings. Included in the papers I handed to Ms. Rosner was a draft of an affidavit of my client, Louis C. Ostrer. I handed this material to Ms. Rosner in order to inform her of certain facts in the case of which she might not have been aware, in order to exchange information with a fellow attorney whose client had at least to some limited extent an interest that was congruent with the interest of my own client, and in order to learn if in any detail she or her client felt that facts stated in my papers were not entirely accurate.

10. After the July 14th hearing before Judge Ward, Ms. Rosner informed me by telephone upon my return to Boston, that Mr. Aronwald had without her authorization obtained the copy of a draft of a proposed Louis Ostrer affidavit that I had handed her earlier that day. She told me that she neither gave it to Mr. Aronwald nor suggested to him its contents, and that any knowledge he had of its contents would have come from his unauthorized obtaining and reading of the document.

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11. I promptly telephoned Mr. Aronwald on July 14th and protested his having obtained and read the draft affidavit, which I pointed out was both attorney-client privileged, and work product, material. Mr. Aronwald responded that he had read "a substantial part of the document" and that Alan Naftalis of his office had also read it. He said he made no copies of it, however, and was promptly returning it to Nancy Rosner. He said that Mr. Naftalis had picked up the document in Court, but that he did not "purposely take it". Mr. Aronwald complained that the Ostrer affidavit had distorted what actually happened at the meeting that I had attended in Aronwald's office. He said that he and his people were dealing with me and my associates "in good faith" and in a "frank and above-board manner" in what was supposed to be an "informal" conference at his office, and now I was preparing a lawsuit against him. I said that I assumed the meeting at his office was "on the record". Aronwald replied that he was "offended and disturbed because you [Dershowitz] made a serious accusation that we have denied", referring to the claim in Mr. Ostrer's draft affidavit that his son Benjamin was virtually being held for ransom by the Strike Force. Aronwald said "that's not the way we conduct business here."

12. During his phone conversation with Mr. Aronwald, he stated that "Ben Ostrer's cooperation itself would lead us nowhere" and he said that he told me so at the meeting at his office. He admitted that he told me at the meeting that Ben would not be indicted if Lou and Ben both cooperated, although

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Ben would have to cooperate only if he had something to offer. Aronwald said that he had made it clear at the meeting that if Ben knew something, Ben would be expected to cooperate, but Ben alone would lead nowhere, and Lou's cooperation was the necessary ingredient. "There's nothing wrong with that", Aronwald said, referring to the structure of this "offer" to Louis Ostrer.

13. Mr. Aronwald during this same phone conversation displayed a knowledge of the contents of the Ostrer draft affidavit. He said that paragraph #4 of that draft was "distorted". I asked how else the Ostrer affidavit that he'd read was distorted, to which he replied that he was also disturbed "with the taint claim", since there had been no contact between his office and the tainted agencies. Mr. Aronwald offered no further examples of how the Ostrer draft affidavit was "distorted" or innacurate.

14. Mr. Aronwald, during the phone conversation, admitted that a copy of the Senate Sub-Committee Report on Local 295 had come into his office. He said that he did not know if Alan Naftalis had read it, but he denied having read it himself. "If we're foolish enough to read the McClennan Committee [Subcommittee] Report," stated Mr. Aronwald to me, "we'll have to face up to an evidentiary hearing and its consequences."

15. Mr. Aronwald, during the phone conversation stated to me that he had no intention of meeting with myself and United States Attorney Fiske to discuss whether this investiga-

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tion should or should not proceed, for the investigation was not under the control of the United States Attorney. He stated that he felt free to bring an indictment at any time, and if Mr. Fiske would not sign the indictment, Aronwald would go directly to the Attorney General for a signature.

16. I returned the conversation to how Mr. Aronwald obtained the draft of the Ostrer affidavit. He said that Mr. Naftalis handed it to him in his office and said to him (Aronwald) that "we're being sued". Aronwald claimed that Naftalis believed that a lawsuit had been initiated against the Strike Force. Aronwald said that the documents looked to him like a civil action complaint. I pointed out to Mr. Aronwald that one did not have to read the whole document to discover that it was an affidavit and not a complaint. Mr. Aronwald said that he did not know where the document came from. He said that he was "satisfied" that Mr. Naftalis did not lift it from Nancy Rosner's desk and then put it with his papers. Mr. Aronwald said that I should blame whoever was responsible for the safekeeping of the document. "Naftalis did not take it intentionally," said Aronwald. "It found its way into his files due to no act on his part." Aronwald said that he was careful with the document while it was in his possession, and that in fact the IRS people wanted to see it, but Aronwald would not let them do so, and instead he returned it to Nancy Rosner forthwith.

17. It seems fairly evident that the document could not have gotten into Mr. Naftalis' papers without the intervention of some act on the part of Mr. Naftalis or someone who meant for it to be placedwith his papers.

18. I told Mr. Aronwald that I was upset. He said that he would be upset if he were in my position. "I'd be upset, too, at whoever was stupid and careless enough to let it get into Naftalis' files," said Aronwald.

19. The Ostrer draft affidavit that fell into the hands of Messrs. Aronwald and Naftalis was a confidential work product, and was in my view covered by the attorney-client privilege. Their having read all or a substratial part of this document has caused serious problems in the planned strategy by the attorneys for members of the Ostrer family in seeking to vindicate the rights of the clients, and I consider the breach in security to be a substantial one.

Alan Dershowitz

Signed and sworn to before me
on this 18th day of August, 1976
Jean C. Sundin
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

LOUIS C. OSTRER,
RITA OSTRER,
JACK OSTRER, and
DINA GELMAN,

Plaintiffs,

-against-

WILLIAM I. ARONWALD,
ROBERT B. FISKE, JR.,
ALAN NAFTALIS,
MARVIN SONTAG,
JAMES KILLEEN,
EDWARD H. LEVI, and
THE UNITED STATES OF AMERICA,

Defendants.

-----------------------------------x

Civil Action
No.__________

AFFIDAVIT

AFFIDAVIT OF RICHARD H. WYNN

RICHARD H. WYNN, being first duly sworn according to law, deposes and says:

1. I am Richard H. Wynn, a member of the Bars of this Court and of the State of New York. I am a member of the law firm of Wynn & Atlas, located in Manhattan. I am counsel to one of the Plaintiffs in this action, Dina Gelman, and I have at times represented Louis C. Ostrer.

2. On May 18, 1976, my partner Jeffrey M. Atlas and I attended a meeting at the offices of the Organized Crime Strike Force for the Southern District of New York, located at St.

Andrews Plaza in Manhattan. Present with us were William I. Aronwald, who is the head of the Strike Force for this District; Alan Naftalis, an attorney with the Strike Force; and an agent of the Internal Revenue Service whose first name is George and whose surname I cannot recall at this time. All three are currently working on the criminal investigation regarding Louis C. Ostrer and members of his family, including my client Dina Gelman, who is Louis Ostrer's sister.

3. Mr. Aronwald informed my partner and me that Louis C. Ostrer, his wife Rita, his sister Dina Gelman, and his son Benjamin Ostrer are the targets of an ongoing criminal investigation and intended prosecution. He stated that the Strike Force would seek indictments against the aforesaid members of Louis Ostrer's family, as well as against certain unnamed business associates of Louis Ostrer, unless Louis Ostrer cooperated with the Government by giving information about and testifying against certain individuals whom the Strike Force wishes to prosecute and convict.

4. Mr. Aronwald stated at this meeting that the Strike Force had previously used the same tactic of indicting family members against one Moe Steinman, when it had brought an indictment against Moe Steinman's son-in-law Walter Bodenstein. Mr. Aronwald indicated that if Louis Ostrer would come in and cooperate with the Strike Force, there would not be indictments against the members of his family.

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5. My partner and I explained to Mr. Aronwald that the Teamsters Union Local No. 295 Severance Trust Fund Plan, which he was now investigating, had been previously fully investigated for several years by the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, the General Accounting Office, the Office of the District Attorney for New York County, the Internal Revenue Service, and the New York State Insurance Department, all without any finding or evidence of illegality and all without resulting prosecution.

6. Mr. Aronwald responded that he was familiar with these previous investigations, but he said that his office was taking a new approach. He stated that his investigation involved a conspiracy by family members. He further stated that subpoenas had been sent to the New York State Department of Insurance.

7. Mr. Aronwald also informed my partner and me that he first began this investigation in December of 1975, and that approval for it had been received from the Department of Justice in January of 1976. Alan Naftalis had joined his staff in February of 1976 to oversee the investigation, he said.

8. We informed Mr. Aronwald that Louis Ostrer had received a letter from the Department of Justice in April of 1976, in response to an inquiry by Ostrer, indicating that the Department knew of no then-current investigations involving

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him. Mr. Aronwald seemed surprised by this statement, and he asked to see a copy of this letter. He suggested that this erroneous information might have been given out by another branch of the Department of Justice which was unaware of the fact that approval for the Ostrer investigation had come from the Taxation Division of the Department of Justice.

9. Furthermore, on Wednesday, July 14, 1976, at approximately 2:30 p.m., I received a telephone call from a very agitated William Aronwald. He stated that because Louis Ostrer was suing him and other members of the Strike Force, there would no longer be any informal conversations between counsel for both sides. Mr. Aronwald stated that he had first learned of the lawsuit from Louis Ostrer's affidavit, that he had been sued before, and that he was not concerned with the outcome of this new litigation. I expressed surprise regarding the existence of such a lawsuit, and he told me that I, too, had sworn to an affidavit in support of that court action. I told him that I had never seen nor signed such an affidavit and knew nothing of the filing of such a lawsuit. Aronwald responded that Louis Ostrer's affidavit, which he had just finished reading, contained a reference to my affidavit. I then asked Mr. Aronwald where he had obtained a copy of Ostrer's affidavit, and he stated "I got it from Nancy Rosner." When I asked how Nancy Rosner was involved with this matter, he did not say more other than that she represented William J. Kilroy. Mr. Aronwald then went on to add that the Ostrer affidavit misrepresented what had

gone on at our meeting of June 11, 1976, at Aronwald's office, in that it failed to note that defense counsel had requested the meeting. Mr. Aronwald stated that he was upset that Mr. Dershowitz had contacted U.S. Attorney Fiske. Aronwald said that this was his investigation, and not Fiske's, and that the investigation would continue.

10. Several hours later, at approximately 4:30 p.m., Mr. Aronwald telephoned me again. Neither this nor the earlier call had been solicited or initiated by me. In this latter conversation, Mr. Aronwald said that he wanted to "set the record straight" regarding how he had come into possession of Mr. Ostrer's affidavit. He said that the affidavit had become "mixed up with" some papers which an unnamed member of his staff had taken with him from Court earlier that day. He added that he'd already spoken with Nancy Rosner and had agreed to return the affidavit and not to make any copies of it. However, he added that he could not wipe out from his mind what he had read.

Richard H. Wynn
Richard H. Wynn

Signed and sworn to before me on
this 30 day of July, 1976.

Florence Prager
Notary Public

FLORENCE PRAGER
Notary Public, State of New York
No. 31-3152515
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

LOUIS C. OSTRER,
RITA OSTRER,
JACK OSTRER, and
DINA GELMAN,

Plaintiffs,

-against-

WILLIAM I. ARONWALD,
ROBERT B. FISKE, JR.
ALAN NAFTALIS,
MARVIN SONTAG,
JAMES KILLEEN,
EDWARD H. LEVI, and
THE UNITED STATES OF AMERICA,

Defendants.

---------------------------------------x

Civil Action

No.__________

AFFIDAVIT

AFFIDAVIT OF NANCY ROSNER

NANCY ROSNER, being first duly sworn according to law deposes and says:

1. I am Nancy Rosner, a member of the Bars of this Court and of the State of New York. My offices are located at 401 Broadway, New York, New York 10013. I am counsel to William Kilroy, not a party in the present action.

2. On July 14, 1976, Attorney Alan Dershowitz gave me a copy of a draft of a proposed affidavit of his client Louis C. Ostrer. Mr. Dershowitz entrusted me with this document on the condition that it remain confidential. I understood the document to be a privileged attorney work-product. I placed the

draft affidavit in my file of Kilroy papers with the thought that it might be helpful in connection with my representation of Mr. Kilroy.

3. Later that day, I appeared before this Court in relation to an application to quash a subpoena served on my client Kilroy. For the sake of this appearance, I brought to court Kilroy's file which included the aforementioned draft affidavit of Louis C. Ostrer.

4. In that court proceeding, I was opposed by Alan Naftalis, Esquire, a defendant in this action, who represented the Government in his capacity as an attorney attached to the Department of Justice Organized Crime Strike Force for the Southern District of New York.

5. Prior to my oral argument in support of Kilroy's application to quash, I began to read the aforementioned draft affidavit of Louis C. Ostrer. I took the draft affidavit along with some of my other papers to the lectern so that I could refer to them during the course of my argument.

6. Before beginning my argument, I realized that the draft affidavit would be useless to me during oral argument, because I was not familiar with its contents. Consequently, I removed the draft affidavit from the lectern and placed it back on my counsel table. I then returned to the lectern to make my argument. I used the lectern once again to make my rebuttal argument.

7. Each time I left the lectern, I cleared it of all of my papers. At the end of the court proceeding, I also cleared off my counsel table, placing all of my papers into my briefcase.

8. Later on the afternoon of July 14, 1976, I learned from Attorney Richard Wynn that Messrs. Aronwald and Naftalis, members of the Department of Justice Organized Crime Strike Force, and defendants in this action, had gained possession of the draft affidavit with which Attorney Dershowitz had entrusted me earlier in the day. I checked the papers that I had brought back from court and found that the draft affidavit was missing.

9. I then telephoned Mr. Aronwald to find out whether he had the confidential draft affidavit and if he had it, how he had obtained possession of it without my consent. In that phone conversation, Mr. Aronwald said that he had the draft affidavit. Mr. Naftalis, Aronwald explained, had found the draft affidavit among the papers which Naftalis brought back to the Strike Force offices after argument on the matter of Kilroy's subpoena. I asked Mr. Aronwald to return the draft affidavit without copying it, and he agreed to do so.

Nancy Rosner

Signed and sworn to before me
this 3rd day of July, 1976.

Notary Public

SHERRI L. FREEMAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 03-1313022
Qualified in Bronx County
Commission Expires March 30, 1977

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

LOUIS C. OSTRER, et ali.,

Plaintiffs,

-against-

WILLIAM I. ARONWALD, et ali.,

Defendants.

-----------------------------------x

76 Civ. 3701 (Judge Ward)

(Part I Judge Werker)

PLAINTIFFS' SUPPLEMENTARY MEMORANDUM

This matter came on for emergency hearing before Judge Werker on Thursday afternoon, August 19, 1976, in Part I of this Court, after which Judge Werker issued a temporary restraining order prohibiting the Defendants from presenting certain kinds of evidence before a grand jury.

On the following day, Friday, August 20, 1976, counsel for one of the Plaintiffs, namely Alan Dershowitz, Esq., received a telephone call from Defendant William I. Aronwald, wherein Mr. Aronwald informed Mr. Dershowitz that earlier this month, another Judge of this Court (the Hon. William C. Conner) issued a memorandum and order denying relief to one William J. Kilroy, who had sought to quash a subpoena ordering him to testify before a Grand Jury in this District that was investigating the Plaintiffs herein, amongst others.

Counsel for the Plaintiffs were aware that Mr. Kilroy had filed and argued his motion to quash, and they surmised, although they were not actually informed, that Judge Conner, before whom the Kilroy motion to quash had come, had denied William Kilroy's motion to quash. Plaintiffs' counsel was familiar with the grounds advanced by Kilroy in support of his motion to quash, was familiar with most of the papers on file in that case, and were aware of the course of the oral arguments had in that matter. In fact, Alan Dershowitz, counsel for Louis Ostrer herein, was present when Mr. Kilroy's counsel argued the motion to quash first before Judge Ward (then sitting in Part I), and later before Judge Conner (who was sitting in Part I after Judge Ward). Hence, Plaintiffs' counsel were aware of the allegations made by both the Plaintiffs and the Defendants in the Kilroy matter, and were aware of the views expressed by both Judge Ward and Judge Conner with respect to that case.

Thus, Plaintiffs had the benefit of knowing the proceedings in the Kilroy case when they drafted the papers that have been filed in the instant action to date, and consequently Plaintiffs' papers seek to fill in certain factual gaps present in Mr. Kilroy's earlier papers, and to rebut certain allegations made by the Government in the

Government's papers filed with Judge Conner in the Kilroy matter.

As soon as Mr. Aronwald informed Mr. Dershowitz that there was a written memorandum and order by Judge Conner in the Kilroy case, Mr. Dershowitz contacted Mr. Kilroy's counsel and requested a copy of said opinion. Said copy was mailed to Mr. Silverglate's office on Friday, August 20, 1976, and arrived in the mail via special delivery over the week-end. A copy of that memorandum and order is now being submitted (attached hereto) to this Court since it might be seen as relevant or related to, albeit distinguishable from, the instant proceedings.

A few observations concerning Judge Conner's opinion in the Kilroy matter are perhaps in order.

In the first place, Mr. Kilroy raised only two of the issues that are present, in somewhat different form, in the instant proceedings. He claimed that his existence as a witness in the current grand jury investigation derived from an unlawful wiretap and eavesdrop, which was the same wiretap and eavesdrop complained of by the Plaintiffs herein. He also claimed that his prior testimony before a New York County Grand Jury effectively immunized him. Since Kilroy was not a target of the grand jury investigation,

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his immunity claim never had to be considered, and indeed it is not considered or decided in Judge Conner's memorandum and order. In contrast, the Plaintiffs herein are targets, and their immunity claim must be decided.

Judge Conner did overrule Kilroy's claim of wiretap taint, but without having held an evidentiary hearing. It is the position of the Plaintiffs herein, first of all, that Judge Conner's reasoning is clearly wrong, and that an evidentiary hearing was plainly required -- or at least it is plainly required in the instant matter. The substance of Judge Conner's analysis of this issue, as understood by Plaintiffs' counsel from the oral argument held before him in the Kilroy matter, is discussed in "Plaintiffs' Memorandum of Law in Support of Requested Relief", filed previously in the instant case, especially at pages 15-23.

More importantly, perhaps, is the fact that the Plaintiffs' papers and affidavits are far more complete and go into far more detail than did Kilroy's papers, since these Plaintiffs had and have access to more facts and sources of information concerning the Government's ongoing investigation involved here. It is the position of the Plaintiffs, as they will argue at the next hearing in this matter, that the affidavits submitted by the Government and considered by Judge Conner in the Kilroy matter are entirely insufficient to rebut the Plaintiffs' claims of Fourth Amendment taint in the instant proceeding.

Equally important is the fact that these Plaintiffs raise a number of important issues not even present in the Kilroy matter, including a claim of improperly motivated and conducted prosecution, and a claim of violation of the attorney-client privilege by reason of the prosecution's having obtained wrongful access to a vital work product document of these Plaintiffs.

In short, the matters presented to the Court by Mr. Kilroy, and decided by Judge Conner, relate to only a small fraction of the claims made in the instant action and supported by sworn statements not before the Court in the Kilroy matter. The allegations here go far beyond what Kilroy presented to the Court. To the extent that Judge Conner's decision touches on issues raised herein, it is in error, as is demonstrated by Plaintiffs' memorandum of law. Finally, the affidavits filed by the Government in the Kilroy matter, on the basis of which Judge Conner rendered his decision, are entirely inadequate to counter the more complete affidavits filed by the Plaintiffs herein.

Respectfully submitted,

Alan Dershowitz
Faculty Office Building
Harvard Law School
Cambridge, Mass. 02138
Tel. (617) 495-4617
Counsel for Louis C. Ostrer

Harvey A. Silverglate
Silverglate, Shapiro & Gertner
217 Lewis Wharf
Boston, Massachusetts 02110
Tel. (617) 723-2624
Counsel for Rita Ostrer

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CERTIFICATE OF SERVICE

I, Harvey A. Silverglate, hereby certify that I served the within "Plaintiffs' Supplementary Memorandum" by mailing copies of same on this day, via first class mail, postage pre-paid, to the following:

Elkin Abromowitz, Esq.
Office of the U. S. Attorney
One St. Andrew's Plaza
New York, New York 10007

William Aronwald, Esq.
Organized Crime Strike Force
One St. Andrew's Plaza
New York, New York 10007

Done this 23rd day of August, 1976, at Boston, Massachusetts.

Harvey A. Silverglate

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U.S. DISTRICT COURT
FILED
AUG 17 1975
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

IN THE MATTER OF A GRAND JURY :
SUBPOENA
: M 11-188 (WCC)
- of -
:
WILLIAM KILROY
MEMORANDUM
AND ORDER
- x

CONNER, D. J.:

This application to quash a grand jury subpoena of William J. Kilroy was the subject of oral argument before this Court on July 21, 1975. The Court reserved decision at that time, to allow for review of the respective affidavits submitted, and the authorities cited, by the parties. That review now completed, this Court has concluded that the Government, through the sworn statements of Assistant United States Attorney Alan Naftalis and Internal Revenue Service Agents Hans G. Seidemann and Edward J. Martin, has effectively countered the instant application by sufficient proof that the investigation leading to the present grand jury inquiry was conducted wholly independently of and, indeed, in ignorance of the contemporaneous state probe, and that the information gathered by the federal agencies was not derived, even indirectly, from the concededly illegal state wiretap. See United States v. Piccaglia, 518 F.2d 77 (2d Cir. 1975).

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This Court is not persuaded that United States v. Birrell, 470 F.2d 113 (2d Cir. 1972), directs a ruling that information obtained from certain records and other documents was tainted merely because those documents, at the time they were sought by federal agents, happened to have been in the unlawful possession of the New York County District Attorney.

SO ORDERED.

WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
August 17, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LOUIS C. OSTRER, :
RITA OSTRER,
JACK OSTRER, and :
DINA GELMAN,
:
Plaintiffs :
-against- :
WILLIAM I. ARONWALD, :
ROBERT B. FISKE, JR.,
ALAN NAFTALIS, :
MARVIN SONTAG,
JAMES KILLEEN, :
EDWARD H. LEVI, and
THE UNITED STATES OF AMERICA, :
:
Defendants.

- - - - - - - - - - - - - - - - - - x

76 Civ. 3701

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GOVERNMENT'S MEMORANDUM OF LAW

I - Factual Background

This Civil action arises from a United States Grand Jury investigation concerning possible violation of certain Internal Revenue Service and other criminal statutes of the United States by the plaintiffs named herein and certain others, including Benjamin Ostrer named by the plaintiffs in their moving papers but not included as a plaintiff. This grand jury proceeding is based upon an investigation conducted by the Internal Revenue Service first through its

Audit Division and then through its Intelligence Division. This investigation was later enlarged by the addition of compliance officers of the U. S. Department of Labor. The basic underlying stimulus to this investigation is the long-standing tax difference between the Internal Revenue Service and taxpayers Louis and Rita Ostrer as to their outstanding tax liability. The tax period covered by this dispute begins in tax year 1958 and runs almost without interruption through the present tax year. The investigation conducted by the Audit Division was to determine the actual tax liability for these taxpayers for certain of the disputed tax years. In addition, the Audit Division became concerned about the tax status of Louis and Rita Ostrer as a consequence of evidence independently compiled by the Audit Division in its "check cashing probe" of certain check cashers in the New York City area. This "check cashers probe" as it affected the Ostrer tax liability began in January of 1970. In respect to both of these investigations investigating agents confine their investigation to books, records and cancelled checks pursuant to their authority under Section 7602 of the Internal Revenue Code and other relevant sections of the Code.

In respect to the investigation of the tax liability of Louis and Rita Ostrer Audit Agents of the Audit Division of the Internal Revenue Service appeared at the office of Louis Ostrer (377 Fifth Avenue, New York, New York) on or about March 8, 1973 to examine certain books and records of these taxpayers and corporations and partnerships with which they were associated.

At the time of their appearance at the Ostrer offices the Audit Agents requested the opportunity to examine certain books, records and other documents in the possession of Ostrer and his corporations in order to determine his actual tax liability. Some of the documents requested by the Audit Agents were unavailable at Mr. Ostrer's office, and he and his representatives informed the Internal Revenue Service agents that these documents were in the possession of the New York County District Attorney's Office. Neither Ostrer nor any of his agents stated the reasons as to why the District Attorney possessed these documents; they did, however, indicate that if the agents wish to see these documents they should go to the District Attorney's office in order to see them. At the time these agents visited Ostrer's office they were unaware of any wire interception or seizure made by the District Attorney. Furthermore, they were unaware of any investigation being conducted by the District Attorney's Office of Ostrer or members of his family or corporations and partnerships to which he was associated.

On March 23, 1973, agents of the Audit Division requested the opportunity to examine certain business records, documents and checks which they had been informed by Mr. Ostrer and his agents were in the District Attorney's custody. These agents over a series of visits to the District Attorney's Office examined these "naked" documents. At no time during the course of their visits or telephone conversations did the agents discuss the nature of the District Attorney's investigation, evidence or grand jury testimony nor did they discuss the nature, substance or background of the Internal Revenue Service investigation. The contact between the Internal Revenue Service and the District Attorney's Office was limited to an examination of certain documents which had originally been sought from Ostrer but were unavailable through him. At no time were any agreements or understandings reached between the Internal Revenue Service agents and representatives of the District Attorney's office concerning "any plan or scheme" to retain these documents for the benefit of the District Attorney's office.

In or about January 1976 the Tax Division of the United States Department of Justice after review of the Internal Revenue Service investigation, referred the possible prosecution of Louis Ostrer and others to the New York Joint Strike Force for further investigation via the grand jury and possible indictment of those found to be in violation of criminal statutes contained in the Internal Revenue Code and

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elsewhere. On or about February 1, 1976, William I. Aronwald Attorney-in-Charge of the New York Joint Strike Force assigned Special Attorney Alan R. Naftalis to oversee the grand jury investigation of this case.

The New York Joint Strike Force was informed that there had existed a prior New York County District Attorney investigation of Louis Ostrer and unnamed others for certain criminal violations. The office was further informed that this investigation had been based upon Court ordered wire interceptions and electronic surveillance which later were both found to have been based upon insufficient probable cause and as a consequence were held to be illegal. Similarly, a series of search warrants issued by a New York State Judge were invalid since the probable cause underlying these warrants was based upon the invalid New York State wire interceptions. While the New York Joint Strike Force was informed of the "tainted" New York State investigation it was not informed of the substance of that investigation nor was it made privy to the evidence and "fruits" of that investigation. As a consequence of the tainted New York State investigation, Mr. Naftalis set down a rigorous set of guidelines for all investigating agents and supervisors participating in the Federal investigation of Louis Ostrer and his associates. These guidelines in sum and substance were aimed at mini-

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mizing all contact between the investigating agents and all outside contacts, particularly with the New York County District Attorney's office. Furthermore, Mr. Naftalis personally interviewed the investigating agents and supervisors to determine the nature of their contacts with outside sources, particularly with the New York County District Attorney's office. His examination of these agents and supervisors disclosed that these agents had not received nor discussed any of the tainted material derived from the New York State investigation. Furthermore, it was found that at no time did any Federal agent discuss the nature or substance of the Federal probe against Ostrer and the other Federal targets. Mr. Naftalis requested that all agents strictly adhere to the guidelines he established concerning outside contacts and thereafter rigorously enforced a "Chinese wall" around the Federal investigation and the investigators participating therein.

In furtherance of the Federal investigation investigators for both the Internal Revenue Service and the U. S. Department of Labor actively began their investigation with an eye towards compiling evidence to be presented to the Federal grand jury. Pursuant to their activity a series of grand jury subpoenae were served upon various businesses, union fund officials and administrators and union funds.

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On May 18, 1976, Jeffrey M. Atlas (counsel for plaintiff Jack Ostrer herein) and Richard H. Wynn (counsel for defendant Dina Gelman herein) visited the offices of the New York Joint Strike Force. Messrs. Atlas and Wynn requested a meeting with the Federal prosecutors asserting that they represented Louis Ostrer and that they wished to discuss a possible Federal investigation pending in this district. Mr. Wynn indicated that their visit was sparked by two events: first, their client's knowledge that a series of grand jury subpoenae had been issued to persons with whom Ostrer had been engaged in certain business dealings; and second, a letter from the Criminal Division of the U. S. Department of Justice responding to Louis Ostrer's Freedom of Information request. Messrs. Wynn and Atlas were informed that indeed an investigation originating from the Tax Division of the Department of Justice was pending in this office. The substance of the meeting is set forth in the affidavit of William I. Aronwald, attached hereto as an exhibit.

On June 11, 1976 a second meeting took place between the prosecutors and some of the investigating agents for the United States, and Messrs. Jeffrey Wynn, Alan Dershowitz and Harvey Silverglate who represented themselves as counsel for various members of the Ostrer family. The substance of that meeting is set forth in the affidavits of William I. Aronwald and Marvin Sontag attached hereto as exhibits.

In June 1976 a grand jury subpoena was served on William Kilroy requiring his appearance before the Federal Grand Jury investigating Mr. Ostrer and others. This subpoena was returnable on June 30, 1976. On June 29, 1976 Jeffrey Atlas contacted Alan R. Naftalis of the New York Joint Strike Force and informed him that he represented Mr. Kilroy before the grand jury. Mr. Naftalis informed Mr. Atlas that a definite conflict of interest existed in his representation of Kilroy in that Kilroy was being called before a Federal Grand Jury and would be given a grant of immunity to testify against Louis Ostrer and others. Counsel for the United States stated that since Messrs. Wynn and Atlas (who are partners at law) had previously represented to the United States that they represented certain members of the Ostrer family including Louis Ostrer, a conflict of interest certainly existed in their representation of a witness against Ostrer. Mr. Atlas indicated that he did not believe that a conflict of interest existed. Mr. Naftalis then indicated that unless Mr. Atlas removed himself as counsel the United States would appear before the Part I Judge for the Southern District of New York and cite the apparent conflict of interest and request that the Court consider ordering Mr. Atlas to remove himself as counsel.

On July 1, 1976, Mr. Atlas telephoned Mr. Naftalis and informed him that Mr. Kilroy had obtained "independent outside counsel". The Kilroy grand jury appearance was therefore postponed to July 14, 1976 by consent of counsel for the United States to enable Mr. Kilroy to confer with his new counsel. Sometime in the week of July 5, 1976, Nancy Rosner, Esquire contacted Mr. Naftalis and informed him that she had assumed the position as Mr. Kilroy's counsel and that she would move to quash Mr. Kilroy's grand jury subpoena. Mrs. Rosner refused to comment on the legal basis underlying this plan of action. At approximately 6:00 p.m. on July 13, 1976, a representative of Mrs. Rosner served moving papers on counsel for the United States returnable on July 14, 1976, the scheduled date of Mr. Kilroy's grand jury appearance. The substance of Mrs. Rosner's argument was that the United States was relying upon the fruits of illegal wiretaps and as a consequence illegal searches conducted by the New York County District Attorney's office as the basis of its present grand jury investigation and the summoning of Mr. Kilroy to testify.

Initial oral argument on this issue was heard by the Honorable Robert Ward who was presiding as Part I Judge on July 14, 1976. Judge Ward did not issue any findings in respect to the papers and argument heard on that date, but rather postponed Mr. Kilroy's grand jury appearance to July 28, and set over the continuation of the oral argument on the issue to July 21 to be heard by the then presiding Part I Judge, William C. Conner.

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On July 21, 1976, Judge William C. Conner, acting in his capacity as Part One Judge for the Southern District of New York received further papers from the United States and Mr. Kilroy by his counsel. In addition, extensive oral argument was conducted before the Court on that day. Judge Conner reserved opinion pending his [illegible]ation of the papers filed and his awaiting of a suppleme[illegible] affidavit to be filed by the United States (copies of all these affidavits are attached hereto as exhibits). The Court indicated that it would issue its decision in the late afternoon of July 27, 1976 and continued Mr. Kilroy's grand jury appearance until July 28, 1976.

It should be noted that during the initial argument before Judge Ward on July 14, 1976 Louis Ostrer and his counsel Alan Dershowitz, Jeanne Baker, counsel for Benjamin Ostrer, Benjamin Ostrer and other persons believed to be members of the Ostrer family and their counsel were present and assisted Mrs. Rosner in her representation of Mr. Kilroy and in the attempt to obtain a Court determination that the present grand jury investigation was tainted due to alleged reliance on the previous New York State investigation. It is further noted that on July 21, 1976, Louis Ostrer and Mr. Dershowitz appeared at the Kilroy hearing being conducted by Judge Conner. At that hearing, counsel for the United States requested that

Mr. Dershowitz and Mr. Ostrer be excluded from the Part I Courtroom since the hearing was ancillary to the grand jury investigation of Mr. Ostrer and therefore counsel for the United States believed that their presence could interfere with the secrecy of the grand jury proceedings. Mrs. Rosner opposed the Government's attempt to exclude Ostrer and Dershowitz and stated that she requested that they be present to assist her in her argument before the Court. The Court determined not to exclude Dershowitz and Ostrer and they therefore were present and assisted Mrs. Rosner throughout the proceedings on July 28, 1976.

On July 28, 1976 Judge Conner's Chambers indicated that the Court had decided to deny Mrs. Rosner's application to quash Mr. Kilroy's grand jury subpoena. The Court indicated that it was enforcing the grand jury subpoena and that is had found the Government's investigation untainted.

On July 28, 1976, William Kilroy appeared before the United States special grand jury sitting in the Southern District of New York and was examined in respect to the investigation of Mr. Ostrer. At the outset of his examination a grant of immunity was conferred upon Mr. Kilroy by the Honorable William C. Conner. Mr. Kilroy's subpoena was continued by the Foreman of the grand jury and Mr. Kilroy was informed that he was subject to recall in this investigation.

On July 29, 1976, a meeting took place in the offices of the United States Attorney for the Southern District of

New York, Robert B. Fiske, Jr. This meeting came at the request of Mr. Dershowitz as counsel for Louis Ostrer and Miss Baker as counsel for Benjamin Ostrer. During the course of this meeting Mr. Dershowitz, who as previously noted was present during both oral arguments concerning the Kilroy charge that the investigation was tainted, indicated his personal knowledge of the decision of Judge Conner to enforce Mr. Kilroy's grand jury subpoena. In fact, Mr. Dershowitz made direct reference to the requests made to Mr. Kilroy by the Foreman of the grand jury.

On August 17, 1976, the Honorable William C. Conner filed a memorandum and order *In the Matter of a Grand Jury subpoena of William Kilroy* (Docket No. M11-188.) In that memorandum and order the Court indicated that "the information gathered by the Federal agencies was not derived, even indirectly from the concededly illegal wiretap". The Court further noted that the United States had offered "sufficient proof that the investigation leading to the present grand jury inquiry was conducted wholly independent of and, indeed, in ignorance of the contemperaneous State probe". A copy of the memorandum and order is attached hereto.

On August 19, 1975, the instant action was filed before the Honorable Henry Werker, United States District Court Judge for the Southern District of New York in his capacity as Part I Judge. The Court denied the request counsel for the plaintiffs for an injunction and certain other relief requested, but did issue a temporary restraining order for certain limited purposes and set August 28, 1976 for the hearing date in respect to that restraining order and other issues raised by the plaintiffs.

PART II

POINT ONE

THE DISTRICT COURT IS WITHOUT JURISDICTION TO RESTRAIN A GRAND JURY.

At oral argument on the motion for a temporary restraining order, this Court observed: "No matter what your factual situation might be, I would never grant an order restraining a Grand Jury from hearing evidence in any case. It seems to me that your relief principally is against an indictment when it is received." (Tr. August 19, 1976, p. 11). We submit that this observation correctly stated the controlling law, and that therefore the temporary restraining order imposed on August 19, 1976, should be immediately lifted and the motion for an injunction denied.

It is a "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the movant has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Younger v. Harris, 401 U.S. 37, 43-44 (1971); see also O'Shea v. Littleton, 414 U.S. 488, 499 (1974); Martinez v. Com. of Puerto Rico, 393 F. Supp. 897 (D.P.R. 1972).

Just as the District Court "is not empowered to control the course of a grand jury investigation " Bursey v. United States, 466 F.2d 1059, 1073 (9th Cir. 1972), neither is the Court "entitled to set limits to the investigation that the grand jury may conduct." *Blair* v. *United States*, 250 U.S. 273, 282 (1919). "It must be remembered that, while a grand jury is not independent of the court, it is not subject to the court's directions and orders with respect to the exercise of its essential functions." *United States* v. *United States District Court*, 238 F.2d 713, 719 (4th Cir. 1956), *cert denied sub nom, Valley Bell Dairy Co., Inc.* v. *United States*, 352 U.S. 981 (1957). The Supreme Court in *United States* v. *Thompson*, 251 U.S. 407, 413 (1920) summarized the law as follows:

> That the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from *any source* which it may deem proper, and is *not therefore dependent for its exertion upon the approval or disapproval of the Court*. (Emphasis Added.)

It is respectfully submitted that the prior restraint imposed on the investigative arm of the Government which is unwarranted and unsupported by the applicable case law. In *United States* v. *Dionisio*, 410 U.S. 1, 17-18 (1973), the Supreme Court in holding that the Court below erred in requiring a preliminary showing of reasonableness before a witness was required to give a voice recording to a Grand Jury stated:

> Any holding that would saddle grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. *** The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it. (Citations and Footnotes omitted.)

More recently, and even more emphatically, the Supreme Court noted in United States v. Calandra, 414 U.S. 338 (1974), the extraordinary difficulties and delays that would be caused by permitting hearings to determine the legality of grand jury proceedings or of evidence to be presented to a grand jury. In that case, a witness claimed that he was being asked questions on the basis of evidence seized in violation of the Fourth Amendment. In rejecting his claim that the Fourth Amendment provided a basis for him to refuse to answer questions before the grand jury, the Court noted:

> Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only

> tangentially related to the grand jury's primary objective. The probable result would be "protracted interruption of grand jury proceedings," Gelbard v. United States, 408 U.S. 41, 70 (1972) (White, J., concurring), effectively transforming them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of the criminal law. Id. at 349-350 (footnote omitted).

In this case, the objection to a pre-indictment hearing on the legality of a grand jury proceeding is even stronger than in Calandra. Calandra was a witness in a grand jury proceeding. The only means by which he could raise his constitutional claims was by refusing to answer and raising the issue as a defense to a contempt prosecution. The plaintiffs in this action, by contrast, will, in the event that they are indicted, have ample opportunity to exercise the full panoply of procedural rights enjoyed by a defendant in a criminal suit, including the suppression of an unconstitutionally or impermissibly seized evidence against them. To allow a hearing in advance of an indictment of any and every claim of the sort presented by the plaintiffs would create a totally new -- and extraordinarily oppressive -- precedent.*

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*Most of the precedents upon which plaintiffs rely for the proposition that this Court has power to enjoin a grand jury investigation involved hearings to suppress evidence after indictment, and thus they offer no support for the proposition that this Court has power to conduct a wide-ranging investigation prior to indictment on the evidence presented to the grand jury. The only cases cited by plaintiffs that involved adjudication prior to indictment, see, e.g., In re Fried, 161 F.2d 453 (2d Cir. 1947) were decided long before the Supreme Court decisions in Dionysio, supra, and Calandra, supra, and thus must be considered to be overruled by the emphatic language in these more recent opinions.

Similarly, the decision of the United States Court of Appeals for the Second Circuit in *In re Persico*, 491 F.2d 1156 (2d Cir. 1974), strikingly illustrates the abhorance held by federal courts for interference in a grand jury investigation. In that case, the Court held that the prior Supreme Court decision in *Gelbard* v. *United States*, 408 U.S. 41 (1972), did not give the witness a right to a hearing to test the illegality of evidence before the grand jury. The Court specifically held that a contemporaneous proceeding to determine the legality of evidence before the grand jury -- even in the context of a contempt proceeding against a recalcitrant witness -- "necessarily inhibits the smooth functioning and efficient operation of that grand jury." Id. at 1162. It necessarily follows that since none of the plaintiffs is in the posture of a witness -- and, indeed, will have additional and independent remedies not available to a witness in the event that they are indicted -- they certainly do not have a right to a hearing at this point.*

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*At oral argument, counsel for plaintiffs attempted to distinguish *Persico* on the ground that in that case the illegality of interceptions was contested and in this case it has already been demonstrated. This argument totally misunderstands the nature of the Court's reasoning in *Persico.* Of particular importance to the *Persico* court was whether or not a hearing would be necessary; since a hearing was required to test the witness' claims, the Court concluded that the importance of the grand jury's smooth functioning precluded that relief. Here, of course, a hearing to determine the existence of a "taint" from prior interceptions and from immunized testimony is exactly what the plaintiffs seek. It follows from *Persico* that they are not entitled to it. This is particularly evident in the context of this proceeding, where it has already been demonstrated in the written opinion of Judge William C. Conner that the present investigation was not tainted by the contemporaneous state probe. See In the Matter of a Grand Jury Subpoena of William Kilroy, Memorandum Number 44975, August 10, 1976.

Finally, the legislative history of the very statute upon which plaintiffs base their claim emphatically states that a hearing is not available in these circumstances. In the Senate Report on the remedy sections of Title III, the Committee members noted: "Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself." Senate Report No. 1097, 1968 U.S. Code Cong. & Admin. News 2112, 2195. Thus, it is crystal clear that to the extent that plaintiffs have standing to complain about the legality of the grand jury investigation at all, they must do so in the normal course of events after indictment, if, indeed, there is any indictment.*

Application of the above standards to the instant situation clearly demonstrates that the Temporary Restraining Order was improvidently granted and that plaintiffs' motion for a preliminary injunction should be denied.

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*The Senate Report did note that "It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding." The Second Circuit in *In Re Persico*, supra, however, specifically noted that "in another context" does not include a contemporaneous proceeding to test the legality of the evidence. Id. at 1162. In addition, of course, the *Kilroy* litigation has already demonstrated "in another context," that plaintiffs are *not* entitled to the relief they seek.

POINT II

THE GRAND JURY INVESTIGATION IS NOT EMPLOYING THE TAINTED FRUITS OF ILLEGAL WIRETAPS AND SEARCHES

As noted in the Fact Statement above, this question has previously been litigated before this Court in oral argument before the Honorable Robert Ward on July 14, 1976 and the Honorable William C. Conner on July 21, 1976. This litigation (In the matter of a Grand Jury subpoena of William Kilroy, Docket No. M11-188) was an attempt on the part of William Kilroy, who had been subpoenaed to give testimony before the Grand Jury against certain persons including the plaintiffs to the instant actions to quash his subpoena on the allegation that the Grand Jury investigation was based upon or the direct result of the fruits of New York County wiretaps and search warrants which were held to be invalid. These are the same invalid acts the present plaintiffs base their claims for relief upon.

Nancy Rosner, counsel for Mr. Kilroy, argued that pursuant to In re Persico 491 Fed. 2d 1156 (2d Cir. 1974) Mr. Kilroy had a right to refuse to answer questions and demand a taint hearing where he believed the investigation to have been an outgrowth of electronic surveillance whose unlawfulness had been established at a prior judicial proceeding.

The United States argued that its inquiry and that of the grand jury had not been privy to, employed or relied upon such material and that the grand jury investigation was completely independent of any New York State proceedings. The United States argued that pursuant to In re Buscaglia 518 Fed. 2d 77 (2nd Cir., 1975), if the Government had not employed any electronics surveillance, it need only assert that fact by way of affidavit from both the prosecuting attorney and investigating agents. In compliance with the 2nd Circuit standard set forth in Buscaglia a series of affidavits were filed with the Court. Similarly see: United States v. Calandra 414 U.S. 338 (1974); Gelbard v. United States 408 U.S. 41, 70 (1972) concurring opinion of Mr. Justice White; United States v. Grusse 515 Fed. 2d 157 (1975) and Korman v. United States 486 Fed. 2d 926, 931 (7th Cir. 1973).

These affidavits, copies of which are attached hereto as exhibits, were examined by the Court under the standards set by Buscaglia, and the Court ruled that they had sufficiently proven that the Government had not directly or indirectly received the tainted fruits of the New York State investigation. Furthermore, the Court made a finding of fact that the federal investigation was independent of the New York State investigation. Judge Conner's memorandum and order is attached hereto. The fact pattern underlying the Kilroy litigation is identical to the one before the

Court in the instant litigation, in that it is the same grand jury investigation and the parties in the instant litigation are citing the same tainted New York investigation as the basis of their suit. This fact pattern as applied to the law of this Circuit seemsbest summarized by Judge Lumbard's concurring opinion in United States v. Grusse, supra, in which he noted:

> It must be remembered that any electronic surveillance is relevant only if it is somehow used in formulating questions that the grand jury intends to ask. Thus, surveillance conducted by the Government the results of which were not known to the agents investigating this case, would not be relevant. In light of these considerations I think that Judge Newman was correct in finding that the affidavit was sufficient. I think that the Assistant United States Attorney handling a case and the FBI agent in charge of the investigation of a case are the two people most likely to know if the fruits of any electronic surveillance were used to gain information on which the grand jury would base its questions. Thus, I think that the denial was sufficient. 515 F.2d at 159.

Furthermore, Counsel for the United States argued and evidenced by way of affidavit, that he had built a "Chinese wall" around his investigation to prevent possible taint in any form from the admitedly tainted New York State investigation.See United States v. Sapere 531 F. 2d 63 (2nd Cir. 1976).

The United States argued and the Court accepted the long standing "doctrine of ultimate discovery" as a basis for ruling that the "naked documents" seen by investigating federal agents in the office of the New York County District Attorney to be free of any taint. Judge Conner stated:

> If the federal government had gotten its initial lead as a result of an illegal surveillance or an illegal warrant or illegal seizure, your point would be ironclad. That is not the case here.
>
> We have a case here where simply by unfortunate coincidence, when the federal government independently undertakes an investigation and goes to ask for records, the state government has them, having illegally seized them. That does not mean that the records are placed out of bounds for the federal investigation. It does not mean that any information that the federal government may get when it looks at those documents which the state illegally seized is thereby tainted. Transcript of Proceedings In the Matter of the Subpoena of William J. Kilroy M11-199, July 21, 1976, pp. 31-32.

Similarly see: United States v. Sapere, 531 F.2d 63 (1976); United States v. Falley, 489 F.2d 33 (1973); United States exrel, Roberts v. Ternullo, 407 F. Supp. 1172 (EDNY 1976); United States v. Capra, 501 F.2d 267, 280 n. 12 (1974); United States v. Cole, 463 F.2d 163,172 (1972); United States v. Friedland, 441 F.2d 855 (1971) and Virgin Islands v. Gereau, 502 F.2d 917, 927-928 (1974).

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Therefore, as previously held after litigation before Judge Conner, this investigation is independent of of the New York State investigation and has not been tainted by that investigation.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York

WILLIAM I. ARONWALD
ALAN R. NAFTALIS
Special Attorneys
U. S. Department of Justice

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

LOUIS C. OSTRER,
RITA OSTRER,
JACK OSTRER, and
DINA GELMAN,

Plaintiffs

-against-

WILLIAM I. ARONWALD,
ROBERT B. FISKE, JR.,
ALAN NAFTALIS,
MARVIN SONTAG,
JAMES KILLEEN,
EDWARD H. LEVI, and
THE UNITED STATES OF AMERICA,

Defendants.

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AFFIDAVIT
76 Civ.

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

William I. Aronwald, being duly sworn, deposes and says:

1. I am the Attorney-in-Charge of the Joint Strike Force Against Organized Crime and Racketeering for the Southern District of New York and as such I am a Special Attorney with and for the United States Department of Justice, and I am one of those named as a defendant in the above-captioned matter.

2. This affidavit is submitted in opposition to the relief sought by the Plaintiffs which your deponent believes to be a blatant and unmitigated effort by the Plaintiffs and their respective counsel to impede, obstruct, delay and interfere with the ability of the grand jury to discharge its proper and lawful function.

3. The Joint Strike Force Against Organized Crime and Racketeering for the Southern District of New York, in conjunction with the Internal Revenue Service and the United States Department of Labor, has, for some extended period of time, been conducting a criminal investigation involving the activities of Plaintiff Louis C. Ostrer and certain members of her family and certain of his associates. In or about January,

1976 this investigation progressed to the grand jury stage and at that time I assigned the investigation to Special Attorney Alan Naftalis, who is also named as a defendant in the instant proceeding.

4. In or about January, 1976 I learned for the first time that Louis C. Ostrer had apparently been involved in an investigation which had been conducted by the New York County District Attorney's office and that during the course thereof certain court authorized electronic surveillance had been utilized but that subsequently the results thereof had been ruled inadmissable and that said electronic surveillance had been declared "illegal" by the New York Courts. At this time I further learned that the evidence derived as a result of the aforesaid New York State electronic surveillance had been made available by the New York County District Attorney's office to the Securities and Exchange Commission (SEC). Upon learning of these facts I immediately notified the supervisory agent personnel and Mr. Naftalis thereof and upon determining that the evidence obtained during the course of our investigation was totally independent of and completely unrelated to the aforesaid electronic surveillance I directed that the personnel assigned to this investigation not have any access whatsoever to any of the evidence resulting from the New York State wiretaps or the fruits derived therefrom.

5. At no time has your deponent ever had occasion to discuss or review the wiretap applications, affidavits or Orders used in connection with the New York County District Attorney office investigation with any of the personnel assigned to that office, nor have I ever had occasion to so review or discuss any of the evidence derived from such electronic surveillance. The same may be and is hereby being stated with respect to the personnel of the Securities and Exchange Commission.

6. Based upon your deponent's knowledge of the background of the investigation referred to in paragraph 3, supra. There is no question in my mind whatsoever that the evidence being used, and thus far obtained, during the course thereof is completely free of any taint resulting from the New York State electronic surveillance.

7. Moreover, your deponent was not aware until the filing of this action by the Plaintiffs herein that Louis C. Ostrer, or any member of his family, had been granted immunity by the State of New York during the course of providing grand jury testimony. In any event neither I, nor to my knowledge has anyone else assigned to the current investigation, have ever had access to, or had occasion to read or review, such grand jury testimony or any of the fruits derived therefrom.

8. On or about May 18, 1976 I had occasion to meet with attorneys Richard W. Wynn and Jeffrey M. Atlas, at their request, in connection with the investigation being conducted by this office of Louis C. Ostrer and certain of his relatives and associates. During the course of this meeting, attended by Mr. Naftalis and Department of Labor Strike Force coordinator George Nash it became apparent that Messrs. Wynn and Atlas had learned from Louis C. Ostrer that grand jury subpoenas had been issued and that it was feared by him that he was or might be a target of the grand jury investigation. Messrs. Wynn and Atlas advised me that in response to a Freedom of Information Act request Mr. Ostrer had, through counsel, been advised by the Criminal Division of the Department of Justice that no investigation was being conducted involving him. In order to correct any possible misunderstanding I undertook to advise Messrs. Wynn and Atlas that in fact such an investigation was being conducted by the Department of Justice but that it was being conducted through, and with the authorization of, the Department's Tax Division and not its Criminal Division. I further advised

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Messrs. Wynn and Atlas that (a) The investigation also involved certain named relatives and associates of Mr. Ostrer, and (b) That I would, as I have since, undertake to advise the Department of Justice as to the apparent confusion arising from the aforesaid Freedom of Information Act request.

9. During the May 18, 1976 meeting, as referred to in paragraph 8, supra, Messrs. Wynn and Atlas expressed surprise upon learning of the investigation being conducted by my office and offered as conclusive evidence that Mr. Ostrer, his relatives and associates were not [illegible] of wrongdoing the fact that prior investigations by federal and state agencies had not established evidence of criminal violations. I thereupon advised Messrs. Wynn and Atlas that while I was aware of such prior investigative undertakings I was also aware that some, if not all of the evidence, derived in the course thereof might be tainted and otherwise inadmissable and that as a result our investigation was being conducted totally independent of such evidence and that "we" were taking steps to insure that "we" not have any access to such evidence nor contact with those agenices which had conducted the aforesaid prior investigations. During the course of this meeting the subject of cooperation by Louis C. Ostrer was raised and I indicated that the Government was especially interested in obtaining such cooperation and further, that if Mr. Ostrer did cooperate it was possible that his relatives would not be indicted as was the case in the investigation of one Moe Steinman which had previously been conducted by my office and about which Messrs. Wynn and Atlas were keenly aware as a result of their representation of certain subjects of that investigation.

10. On or about June 4, 1976 I received a telephone call from attorney Richard W. Wynn who requested that a meeting be held to discuss the "Louie Ostrer" investigation. During this conversation Mr. Wynn stated that the meeting had been suggested by attorneys Alan Derchowitz and Harvey A. Silverglate

who were representing the Ostrers. I advised Mr. Wynn that I was quite busy and that if the purpose of the meeting was to determine particulars regarding the investigation I would not be inclined to meet with them. Mr. Wynn then advised me that the purpose of the meeting was to explore possible avenues of cooperation and as a result a meeting was scheduled in my office, for June 7, 1976.

11. As a result of a scheduling problem the meeting scheduled for June 7, 1976 was postponed and did not take place until June 11, 1976. Those present included Messrs. Wynn, Dershowitz, Silverglate, Naftalis and myself as well as Internal Revenue Service Strike Force Representatives Marvin Sontag and James Killeen, both of whom are Special Agents with the Internal Revenue Service and both of whom are named as defendants herein.

12. During the course of the June 11, 1976 meeting Mr. Dershowitz expressed concern regarding the prospects of Benjamin Ostrer, a target of the investigation and the son of Louis C. Ostrer, who curiously enough is not a Plaintiff to this proceeding, being indicted. Mr. Dershowitz stated that Benjamin Ostrer was a graduating law student and that the prospects of his admission to the Bar of the State of New York would be substantially and adversely affected if he were the subject of an indictment. At this point, Mr. Sontag stated that obviously the indictment itself could have no such adverse affect if he were ultimately acquitted. When Messrs. Dershowitz and Silverglate expressed disagreement with Mr. Sontag's view, I interjected and agreed that they were correct and that an indictment itself could create substantial difficulty insofar as the prospective admission of Benjamin Ostrer to the Bar of the State of New York was concerned. I also recall advising Messrs. Dershowitz and Silverglate that that was of no concern to this office and that it was not a relevant factor insofar as the investigation was concerned. In sum, throughout the meeting it was made clear to those representing the Ostrer

family that if the evidence established criminal violations by Louis C. Ostrer or his relatives, including his son Benjamin, indictments would be sought. In addition Messrs. Dershowitz and Silverglate inquired as to what type of cooperation the Government was interested in and they were advised that (a) Louis C. Ostrer would have to provide information and testimony regarding organized crime figures with whom he had been believed to be dealing, and (b) That, insofar as his relatives were concerned they also would have to provide information and testimony as deemed necessary and relevant. In short, Messrs. Dershowitz, Silvergate and Wynn were advised that whereas the Government did not believe that the relatives themselves would be privy to everything that Louis C. Ostrer would have himself been privy to, that the Government was not interested in obtaining the cooperation of merely the relatives themselves. During the course of this meeting Messrs. Dershowitz and Silverglate inquired as to such matters as what the Government could do to "protect" those who would be willing to provide the cooperation as discussed, and as to what type of information and testimony the Government was interested in obtaining. At the conclusion of the meeting it was agreed that the Government would hold off the filing of any indictments for one month so as to give Louis C. Ostrer, his relatives and the attorneys representing their interests sufficient time to further explore the possibility of cooperation. Indeed the impression conveyed to me by Mr. Dershowitz was that he intended to recommend to "The Ostrers" that they cooperate with the Government. At no time during this meeting did Messrs. Dershowitz, Silverglate or Wynn express the insulting and offensive view that the Government was conducting an investigation by ransom as is now suggested by Mr. Dershowitz.

13. Thereafter, Mr. Naftalis advised me that he had received a telephone call from Mr. Dershowitz who stated that it appeared that cooperation was out of the question and that it was his view that the Government was "ransoming off" Louis C. Ostrer's relatives in an effort to coerce him to cooperate.

I thereupon advised Mr. Naftalis to inform Mr. Dershowitz that the Government was no longer interested in working out any deal with the Ostrers and that the Grand Jury investigation would continue.

14. It is my profound opinion that the institution of these proceedings is designed to (a) obstruct, delay, impede and interfere with the ability of the Government and more particularly the grand jury to continue with, and effectively and responsibly conclude the ongoing investigation, and to (b) intimidate and harass myself and those other officials and individuals named as defendants herein to the end that the investigation be abruptly terminated.

WHEREFORE, your deponent respectfully submits that the relief sought be in all respects denied and that the action herein be dismissed.

William I. Aronwald
Special Attorney
U. S. Department of Justice

Subscribed and sworn to before
me this   day of August, 1976

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DISTRICT COURT
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOUIS C. OSTRER, RITA OSTRER,
JACK OSTRER, and DINA GELMAN,

Plaintiffs,

- against -

WILLIAM I. ARONWALD, ROBERT B.
FISKE, JR., ALAN NAFTALIS, MARVIN
SONTAG, JAMES KILLEEN, EDWARD H.
LEVI, and THE UNITED STATES OF
AMERICA,

Defendants.

OPINION

76 Civ. 3701

APPEARANCES: (See last page)

HENRY F. WERKER, D. J.

On August 19, 1976 this court signed a temporary restraining order prohibiting the defendants from presenting to the Grand Jury any evidence obtained directly or derivatively from unlawful wiretaps and electronic eavesdropping devices and from testimony given by any of the named plaintiffs in this action as defendants under a grant of immunity conferred by the courts of the State of New York. A hearing was held on August 28, 1976 with respect to this matter and the following opinion shall constitute the court's findings of fact and conclusions of law for the purposes of this motion.

The plaintiffs, Louis C. Ostrer, his wife Rita Ostrer, his father Jack Ostrer, and his sister Dina Gelman have filed a civil action against certain government officials and the United States of America. The gravamen of the complaint is that the Government, through illegal and unethical means is seeking to coerce plaintiff Louis Ostrer into providing testimony to a federal grand jury regarding Louis Ostrer's business associates, particularly about those who have "connections with organized crime" and those who are "labor racketeers." The plaintiffs have identified several alleged illegal and unethical means, but this court is concerned solely for the purposes of this motion with the presentation to the Grand Jury of evidence obtained directly and derivatively through illegal wiretaps and through immunized testimony.

The evidence before the court indicates, and the Government concedes, that Louis Ostrer was the subject of a wiretap illegally installed by the New York District Attorney's Office from October 25, 1972 through February 21, 1973. As a result of that wiretap, a massive search and seizure was conducted by that office on February 21, 1973. The plaintiffs allege that this tainted evidence was passed by one Governmental branch to another until it ultimately by one or more routes became the basis of the current grand jury investigation into possible violations of certain Internal Revenue Service and other criminal statutes by the plaintiffs in this action.

Furthermore, in February and March of 1974, Louis Ostrer testified under a grant of transactional immunity conferred by the State of New York before a New York State Grand Jury. The questions involved his business and financial affairs. The plaintiffs allege that the details of this testimony have also been made available to the United States Attorney conducting the current investigation.

In January 1976, the Tax Division of the Department of Justice reviewed the investigation conducted by the Internal Revenue Service and referred the possible prosecution of Louis Ostrer and others to the New York Joint Strike Force for further investigation. The Strike Force was informed of the New York State investigation and of the facts involving the illegally obtained evidence. To prevent any taint of its investigation, the Strike Force took considerable precautions to keep its investigation independent from that which the State of New York and its agencies had conducted. Furthermore, strict guidelines were established for the conduct of the agents involved in the Strike Force investigation and all participants were forbidden from discussing the case with anyone from the New York County District Attorney's Office or the United States Attorney's Office for the Southern District of New York. In addition, these participants were forbidden to rely on evidence obtained as a result of the prior illegal wiretap. The Government has provided this court with sworn statements by Alan Naftalis, Special Attorney, Hans G. Seidemann, Revenue Agent, Frederick J. Sweeney, Compliance Officer, Edward I. Martin, Audit Agent, and William I. Aronwald, Special Attorney, denying any use of tainted evidence and any discussions with members of the other governmental authorities in the investigation of this case. The evidence before the court indicates that the Strike Force has made every effort to conduct an independent investigation, and there is no evidence before the court that would indicate that this goal has not been achieved.[1]

In deciding this matter, the court must give effect to the general proposition that "/a/ grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970), cited with approval in United States v. Dionisio, 410 U.S. 1 (1973). Furthermore, the Supreme Court has recently held that "/a/ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." United States v. Dionisio, supra at 17. The grand jury's investigation must proceed without

> "the evidentiary and procedural restrictions applicable to a criminal trial. Permitting witnesses to invoke the

> exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective."

United States v. Calandra, 414 U.S. 338, 349 (1974).

In the face of these general rules the plaintiffs argue that where a wiretap is concededly illegal and where testimony is given under a grant of immunity, no suppression hearing need be held and the court should, as a matter of law, enjoin the presentation of evidence to the grand jury based on illegally obtained evidence and the immunized testimony. The Government may not use a witness's immunized testimony as a basis for indicting him in another jurisdiction. United States v. Calatano, 491 F.2d 268 (2d Cir.), cert. denied, 419 U.S. 825 (1974). Furthermore, where the Government has illegally intercepted a witness' communications and the testimony it seeks from that witness is derived from that illegal interception, that witness may refuse to answer those questions where asked by the grand jury and use the illegal interception as a defense in a contempt proceding. Gelbard v. United States, 408 U.S. 41 (1972).

However, the case before the court differs in one highly significant respect from Gelbard. Here, there is substantial and credible evidence provided by the Government that none of the evidence currently being presented to the grand jury has been derived directly or indirectly from illegally obtained evidence. The court cannot rule as a matter of law that presentation to the grand jury of the evidence obtained by the Strike Force in its investigation must be prohibited on the ground that it is tainted. Any determination by this court as to the propriety of the evidence to be brought before the grand jury would require a hearing with respect to each piece of evidence and scrutiny of every detail of its production. This would be directly contrary to the Supreme Court's ruling that suppression hearings regarding evidence before a grand jury are not the appropriate vehicle for terminating a criminal prosecution.

In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974), is not to the contrary. The Second Circuit held that where evidence being presented to a grand jury is derived from a wiretap and where the orders authorizing that wiretap are in compliance with the statutory requirements, a witness is not entitled to a suppression hearing to test the legality of the surveillance. The witness may refuse to testify only where the wiretap is concededly or on its face illegal. The court relied on the notion that the functioning of the grand jury should not be interrupted to permit a plenary suppression hearing to determine illegality.

That concept is equally applicable in this context. The proceeding before the Grand Jury appears on its face to be proper. The Government has provided substantial testimony that the evidence before the grand jury is not tainted. To make any other determination, this court would be required to conduct an extensive and lengthy suppression hearing. This court will not interfere with the grand jury proceeding to such an extent.

Furthermore, the plaintiffs have failed to show the absence of an adequate remedy at law. If, as and when an indictment is returned, the plaintiffs may move to dismiss the indictment and to suppress excludable evidence. Where the petitioner fails to establish the basic requisites for the issuance of a preliminary injunction, the motion must be denied. O'Shea v. Littleton, 414 U.S. 498 (1974).

The temporary restraining order is vacated, and the preliminary injunction motion is denied.

During the course of the argument in this matter the government requested that the court refer Alan Dershowitz, Esq. to the Chief Judge of this District under General Rule 5(f) principally upon the grounds that counsel had not honestly stated when he had received a copy of an affidavit made by Nancy Rosner, Esq. in connection with an application to quash a grand jury subpoena with respect to one William Kilroy and also that he had failed to disclose the fact that Judge Conner of this court had issued a memorandum denying the motion to quash. I am satisfied with Mr. Dershowitz' explanation as to the former and I am satisfied that the case before Judge Conner was distinguishable from the present one. The motion to refer is therefore denied.

However, counsel for plaintiffs Louis Ostrer and Rita Ostrer do not appear to maintain an office for the practice of law within this district. Their attention is called to Rule 4(a) of the General Rules of this court which states that "No member of the bar of this court not having an office within the Southern or Eastern District of New York should appear as attorney or proctor of record in any cause without designating with his initial notice or pleading a member of the bar of either district having an office within the Southern or Eastern District of New York upon whom service of papers may be made." Also, Rule 3(c) permits "[o]nly an attorney or proctor of this court [to] enter appearances for parties." The court expects the attorneys in this matter to comply with these rules.

SO ORDERED.

DATED: New York, New York
August 31, 1976

U. S. D. J.

APPEARANCES:

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Of Counsel

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Of Counsel

LOUIS C. OSTRER, et al., v. WILLIAM I. ARONWALD, et al., 76 Civ. 3701

NOTES

1. While it is not dispositive on this point, the court takes notice of the fact that another judge of this court, the Honorable William C. Conner, has concluded that the Government has provided "sufficient proof that the investigation leading to the present grand jury inquiry was conducted wholly independently of and, indeed, in ignorance of the contemporaneous state court, and that the information gathered by the federal agencies was not derived, even indirectly, from the concededly illegal state wiretap." In the Matter of a Grand Jury Subpoena of William Kilroy, M11-18 (Aug. 17, 1976) at 1.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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LOUIS C. OSTRER, RITA OSTRER, :
JACK OSTRER, and DINA GELMAN, :

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Plaintiffs, :

NOTICE OF MOTION

-against- :

76 Civ. 3701 (RJW)

WILLIAM I. ARONWALD, :
ROBERT B. FISKE, JR.,
ALAN NAFTALIS,
MARVIN SONTAG, :
JAMES KILLEEN,
EDWARD H. LEVI, and
THE UNITED STATES OF AMERICA, :

Defendants. :

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SIR:

PLEASE TAKE NOTICE that upon the Memorandum of Law submitted herewith, the defendant by its attorney Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, will move this Court before the Honorable Robert J. Ward, United States District Court Judge in Room 511-A of the United States Courthouse, Foley Square, New York, New York, on December 30, 1976, at 9:30 a.m., for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the complaint, and for such further relief as is just and proper.

Dated: New York, New York
December 20, 1976

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendants

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

238

LOUIS C. OSTRER, et al,
Plaintiffs
v.
WILLIAM I. ARONWALD, et al,
Defendants.

No. 76 Civ. 3701 RJW

PLAINTIFFS' OPPOSITION TO DEFENDANTS MOTION TO DISMISS

The Plaintiffs hereby oppose the Defendants Motion To Dismiss Pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure.

The grounds for their opposition are set out in a Memorandum of Law filed this day.

Respectfully submitted,

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TO: Gary M. Cooper
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New York, NY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x

LOUIS C. OSTRER,
RITA OSTRER,
JACK OSTRER, and
DINA GELMAN,

Plaintiffs,

- against -   76 Civ. 3701

WILLIAM I. ARONWALD,
ROBERT B. FISKE, JR.,
ALAN NAFTALIS,
MARVIN SONTAG,
JAMES KILLEEN,
EDWARD H. LEVI, and
THE UNITED STATES OF AMERICA,

Defendants.
- x

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO RULE 12(b) FEDERAL RULES OF CIVIL PROCEDURE

Preliminary Statement

This memorandum is submitted by defendants in support of their motion to dismiss the complaint herein, pursuant to Rule 12(b) Federal Rules of Civil Procedure. Plaintiffs seek to suppress certain evidence for use in judicial proceedings. They also seek to have the Court discharge a grand jury sitting in this district and to have the Court direct the defendants to desist from alleged harassment, and coercive activity. Plaintiffs are also seeking full immunity from prosecution in connection with possible crimes being investigated by the grand jury in this district. Finally the plaintiffs demand $20 million in actual damages, and $30 million in punitive damages against defendants jointly and separately.

While plaintiffs demands are expansive and extraordinary they have failed to state a claim upon which relief may be granted. Moreover, it is respectfully submitted, that this Court does not have jurisdiction over the subject matter of this action.

FACTS

The facts, as set forth in the complaint, in summary, are as follows. The plaintiff alleges that the Organized Crime Strike Force and other prosecutorial agencies of the United States are making use of tainted evidence and immunized testimony which was provided by the New York City District Attorney's office in their grand jury investigations of plaintiffs activities. To the extent that this is occurring plaintiffs request the Court to enjoin further use of such evidence and testimony and to discharge the grand jury which has been conducting the investigation of plaintiffs.

Plaintiffs' also allege that defendants have intentionally conspired to discredit plaintiffs in order to

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deprive them of their livelihood by harassing them and defaming them. Specifically, defendants are alleged to have summoned plaintiffs to various grand juries in different jurisdictions at the same time; seized plaintiffs' business records; leaked defamatory stories to the news media; testified before Congressional Committees, and made statements in open court, casting aspersions and innuendos against plaintiffs, which testimony and statements were subsequently published; attempted to disuade plaintiffs' business associates from doing business with them; engaged in repetitious and overlapping investigation.

Plaintiffs also claim that defendants believe that plaintiff, Louis Ostrer, has certain evidence with respect to criminal activity of various union officials with whom he associates for business purposes. In this connection plaintiffs allege that defendants refuse to believe that Louis Ostrer is being completely candid when he states that he does not have any information concerning illicit activity of the subject union officers. Plaintiffs claim that defendants have intentionally and maliciously embarked upon a program to harass and coerce Louis Ostrer into providing information concerning the union officials, notwithstanding the truth or correctness of the information.

It is also claimed that defendants have conspired to pressure plaintiff, Louis Ostrer into providing evidence by threatening to indict various members of his family including the remaining plaintiffs and Louis' son Benjamin (see companion case, Benjamin Ostrer v. W.I. Aronwald, et al., 76 Civ. 3702). This conduct, it is alleged is designed exclusively to coerce Louis Ostrer into cooperating with government prosecutors in their investigation of "organized crime" members and violates plaintiffs' Constitutional rights, under the First, Fourth, Fifth and Sixth Amendments.

Finally, defendants are alleged to have acquired, without plaintiffs' consent, an affidavit prepared by plaintiffs' attorneys for purposes of litigation. This acquisition is said to have infringed plaintiffs' rights to counsel, guaranteed by the Sixth Amendment. (While defendants do not intend to dispute the facts, as set forth in the complaint, on this motion, the affidavit in question, upon information and belief, is at this time a public record in the Benjamin Ostrer case, supra.)

Plaintiffs, in addition to their claims for permanent relief, requested and moved for preliminary relief to enjoin further presentation of alleged tainted evidence and immunized testimony to the grand jury alleged to be investigating plaintiff. By Opinion dated, August 31, 1976, the Honorable Judge Werker vacated a temporary restraining order and denied plaintiffs request for preliminary relief. A copy of the opinion is submitted herewith as Exhibit A for the convenience of the Court.

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ARGUMENT

I

THE COURT SHOULD DECLINE TO CONSIDER THE FIRST AND SECOND CAUSES OF ACTION

In the first two causes of action in the complaint, plaintiffs essentially claim that tainted evidence has been presented to the Grand Jury and that a grant of transactional immunity has been violated. These allegations have been decided on a prior motion before this Court in this case, as well as in a motion which was decided in this court involving the grand jury which is purported to have received the evidence. The causes of action are, therefore, foreclosed by the doctrine of "law of the case".

The doctrine of "law of the case", as applied to the effect of previous orders on later action by the court rendering them in the same case, expresses the practice of courts generally to refuse to reopen what has been decided. Messinger v. Anderson, 225 U.S. 436, 444 (1912). This practice is based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter. United States v. United States Smelting, Refining & Min. Co., 339 U.S. 186, 198 (1950). The rule is not an inflexible one, however, the court having discretion to reconsider a prior ruling by a different judge, if the circumstances warrant. Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131 (2d Cir.), appeal

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dismissed, 352 U.S. 883 (1956); United States v. Richardson, 291 F.Supp. 441 (S.D.N.Y. 1968).

In the instant case, the issues in the first and second causes of action were the subject of a full hearing before the Honorable Judge Werker on or about August 28, 1976. The Court, in a six-page opinion, a copy of which is attached, decided that the allegations were without merit and denied plaintiffs' motion for a preliminary injunction, while vacating a prior temporary restraining order (Opinion, pp. 6 and 7). This ruling should, without question, represent the law of the case with respect to the allegations of the first and second causes of action.

While the Court has the discretion to require further evidence on these issues, there are several factors in this case which weigh against such a determination. In Judge Werker's opinion, he noted that the same issues were decided, derivatively, in a separate decision by the Honorable Judge Conner in In The Matter of A Grand Jury Subpoena of William Kilroy, M11-188 (August 17, 1976), a copy of that opinion is also annexed for the Court's convenience. Thus, reconsideration of the issues presented in the first two causes of action at this juncture would be the third such consideration given to these issues by this Court.

Of equal importance is the substantial record with respect to the hearing and subsequent briefs on the motion for preliminary injunction. This record conclusively establishes that plaintiffs allegations are nothing more than provocative speculation.

To require the plaintiffs at this juncture in a grand jury proceeding to litigate the issues raised in the first and second causes of action would be contrary to the weight of authority on pre-indictment challenges to grand jury investigations (Werker Opinion, pp. 3 and 7). In light of the fact that the plaintiffs failed on two prior occasions to present evidence to refute the government's showing, and the fact that the opinion of both Judge Werker and Judge Conner encompass the issues raised in the first and second causes of action, it is respectfully submitted that this Court should invoke the doctrine of the "law of the case" to foreclose repetitious and burdensome litigation with respect to the first two causes of action.

II

PLAINTIFFS FAIL TO STATE A CAUSE OF ACTION

a) Conclusory Allegations Are Not Sufficient To Support Allegations of Conspiracy

Plaintiffs allege that the defendants have conspired to harass them by directing them to appear before several grand juries in different jurisdictions, at ". . . approximately the same, or overlapping, or proximate times . . ."* It is also claimed that plaintiffs' business records have been subpoenaed** by different grand juries at the same time. Plaintiffs also allege that they are subject to indictment by a grand jury merely because plaintiff Louis Ostrer will not cooperate in an investigation of union officials.

Plaintiffs' allegations that they have been summoned to appear before several grand juries in several different jurisdictions as a result of defendants' conspiracy to harass them is perplexing. Even if it is true that plaintiff has been summoned to appear before different grand juries at overlapping times, it is difficult to understand the basis for plaintiffs' conclusion that the defendants are responsible. While defendants Fiske, Naftalis, and Aronwald may have authority to direct the course of an investigation in the Southern District, to conclude that they are also responsible for the timing of summonses to appear to testify in other alleged investigations in other jurisdictions doesn't even arise to the level of speculation. The same reasoning obviously applies to plaintiffs' allegations concerning the defendants' responsibility for the seizure of plaintiffs' business records by other prosecutors.

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* While it is not entirely clear what is intended by this clause, apparently plaintiffs are alleging that they have been directed to appear before different grand juries at the same time.

** Plaintiffs also allege that their business records have been "seized" or "otherwise appropriated"; however it is assumed that plaintiffs would have specifically allege that these records were unlawfully seized if they were procured by means other than legal process.

Suffice it to say that these allegations appear to be nothing more than idle speculation and conclusory reasoning of individuals who have become embroiled in legal difficulties as a result of their activities. Plaintiffs have not alleged a single fact in support of these conclusory allegations. They do not state when these activity occurred, where they occurred, who was present, or who was subjected to them. It is submitted that defendants can not really even respond intelligently to such allegations, except insofar as they conclude that the activity was designed to harass or coerce plaintiffs.

The alleged improper activity is claimed to be a result of a conspiracy to harass and coerce defendant, Louis Ostrer, into waiving his constitutional rights (Complaint ¶1). However, the federal courts, and particularly this circuit, have consistently held that allegations of conspiracy to violate civil rights may not rest upon vague and conclusory allegations. *See* *Powell* v. *Workmen's Compensation Bd.*, 327 F.2d 131, 137 (2d Cir. 1964); *see* *Jacobson* v. *Organized Crime & Racketeering Section of U.S. Dep't of Justice*, ___ F.2d ___, Dkt. No. 76-6015 (2d Cir., Nov. 3, 1976); *Koch* v. *Yunich*, 533 F.2d 80, 85 (2d Cir. 1976); *Fine* v. *City of New York*, 529 F.2d 70, 74 (2d Cir. 1975); *Powell* v. *Jarvis*, 460 F.2d 551, 553 (2d Cir. 1972); *Kaufman* v. *Moss*, 420 F.2d 1270, 1275 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); *Scott* v. *University of Delaware*, 385 F.2d 937, 944-45 (D. Del. 1974). While concededly these cases involve action predicated upon the conspiracy sections of 42 U.S.C. § 1983, they are clearly applicable to allegations of conspiracy by federal officials to violate individual civil rights under the Constitution.* Also see: Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 703 and n.3 (2d Cir. 1972), cert. denied, 409 U.S. 883 (1972); Marshall v. Electric Hose & Rubber Co., 65 F.R.D. 599, 603-06 (D. Del. 1974).

b) Fourth Cause of Action is Premised Upon Misconception of Legal Presumptions

Plaintiffs' averments that they are subject to prosecution as a result of the failure of plaintiff of Louis Ostrer to cooperate with the defendants is also without support in the law.

Plaintiffs contend that the grand jury investigating their activities is a "rubber stamp" for defendants' alleged misconduct. This allegation is essential to the fourth cause of action, since it is the grand jury which will decide to indict or not to indict plaintiffs, and not the defendants, the plaintiffs had to allege that the grand jury was nothing more than a "rubber stamp" for defendants' decision. This conclusion is not only unsupported by factual allegations, it is contrary to all of the traditional teachings surrounding the concept of the grand jury. In United States v. Smyth et al.,

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* An action against a federal official for violation of constitutional rights is analogous to an action against state officials under 42 U.S.C. § 1983, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1346 (2d Civ. 1972).

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104 F. Supp. 233 (N.D. Cal., S.D. 1952), a case involving a motion to dismiss an indictment for alleged misconduct on the part of the Assistant United States Attorney, the Court stated:

> "The grand jury is similar to the trial jury, who may convict notwithstanding positive instructions to acquit and who may pardon notwithstanding a direction to find guilty. Unquestionable, the grand jury are under no necessity to follow the orders of the prosecturo.44" They can present an indictment whether he will or not.45" Id., p. 294

> "44. The government attorney's duty is to advise and assist the grand jury; he has no powers of control over it." 28 California Law Review 576.
>
> "45. Neither the Attorney General of the United States nor a United States Attorney may summon a grand jury. This function belongs exclusively to the court. Rule 6, Federal Rules of Criminal Procedure, states the immemorial practice and power by providing, "the court shall order one or more grand juries."
>
> "8. What is the place of the United States Attorney (or his assistant) in the functioning of the grand jury? You must naturally accord him the respect due an officer of the government, sworn to protect and enforce its laws; you must realize that usually he is an intelligent, experienced individual acting in all sincerity. But do not forget that he is, from the viewpoint of the grand jury, only a lawyer, an agent of the Federal Department of Justice and by law he is only the legal advisor to the grand jury. This does not make him infallible in his opinions, although his experience and position require respectful attention of the jurors. Should a dispute arise between him and the

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> grand jury, recourse should be had to the federal judge who administered the oath to you". The grand jury has the power and duty" "7. To insist at all times on the independence of the grand jury from pressures of any sort, whether these stem from the prosecuting official or the court * * *." Manual for Grand Jurors, prepared by the Federal Grand Jurors Association for the Eastern District of New York, Congressional Record, February 21, 1952, A11115. Id at p. 294, footnote (44)

Regardless of what the defendants say or do, it is the grand jury which will ultimately determine whether their is sufficient evidence to indict. Hence, plaintiffs' allegations that defendants have threatened to indict them unless Louis Ostrer cooperates is dependent upon an allegation that the grand jury is a "rubber stamp" for defendants. Such an allegation, standing alone, however, is not sufficient to overcome the presumption of propriety surrounding the grand jury. United States v. Johnson, 319 U.S. 503 (1943); Blair v. United States, 250 U.S. 273 (1919); United States v. Harke-Hanks Newspaper, 254 F.2d 366 (5th Cir. 1958).

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Plaintiff contend that the defendants will secure indictments, presumedly through the "rubber stamp" grand jury without sufficient evidence. This allegation is that the heart of plaintiffs fourth cause of action and is troublesome for several reasons. First, plaintiffs can not be privy to what evidence the grand jury may have heard or will eventually hear with respect to its investigation, with the possible exception of their own testimony and/or their business records. Secondly, while plaintiffs apparently do not agree, the grand jury function is presumed to be distinct from that of the prosecutor. United States v. Smyth, supra, at 294. Third, there is no requirement that an indictment be based on evidence sufficient to establish with certainty that those charged are guilty of the charges. Guilt or innocence must be determined by the Court and jury. United States v. Wortman, 26 F.R.D. 183 (E.D. Ill. 1960).* Fourth, the grand jury, contrary to plaintiffs assertions, is presumptively unbiased and independent. In Costello v. United States, 350 U.S. 359 (1956), the Supreme Court annunciated the prevailing view regarding unsupported allegations that inadequate evidence is being presented to a grand jury:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before

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* A "problem cause" standard applies to indictments.

> the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn b[illegible] if valid on its face, is enough to call for a trial of the charge on the merits. The Fifth Amendment requires nothing more." Id., at p. 363 (footnote omitted).

Plaintiffs contentions with respect to the grand jury and the sufficiency of evidence to indict is obviously mere speculation; and such speculation can not serve to invite the drastic relief which plaintiffs request, i.e. discharge of the grand jury, and immunization from prosecution. In *Blair* v. *United States*, 250 U.S. 273 (1919), the Supreme Court addressed the situation in which the scope of the grand jury investigation is challenged on the basis of forecasts of probable results:

> "he [a subpoenaed witness] is not entitled to set limits to the investigation that the grand jury may conduct . . . It is a grand inquest, a body with powers of investigation and inquisition, *the scope of whose inquiries is not limited narrowly by questions of propriety or forecasts of the probable result of the investigation.*" (Emphasis added) *Id.* p.

In *Application of Radio Corp. of America*, 13 F.R.D. 167 (S.D.N.Y. 1952), a case in which this Court denied a motion to quash a grand jury subpoena on the grounds that it would infringe the rights of a grand jury to conduct its examination, the Honorable Judge Weinfeld employed the *Blair* reasoning:

> "The Grand Jury 'is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime * * * [W]itnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court nor not. At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction.'7 Thus, in the instant case, the arguments as to res judicata and lack of jurisdiction are premature8. If and when a true bill is returned by the Grand Jury wherein the movant is named as a defendant, it may then, of course, interpose such plea in bar as if may be advised." Id., pp. 170-171
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> "7 Blair v. United States, supra, footnote 6 250 U.S. at pages 282-283, 39 S. Ct. at page 471.
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> 8 Application of Texas Co., D.C. 27 F. Supp. 847; In re American Medical Association, D.C. 26 F. Supp. 58; In re Kittle, C.C., 180 F. 946." Id.

In addition to its apparent focus upon "forecasts" in Blair, the Court also stated that questions of "propriety" of an investigation should not be permitted to narrow the scope of the investigation. Indeed, mere speculation is not sufficient to overcome the presumption that the grand jury action is proper. Costello v. United States, supra, at p. 363; United States v. Steel, supra, at p. 582; United States v. Fujimoto, 102 F. Supp. 890, supra. Moreover, a mere suggestion that the prosecutor's bias has in some way been instilled into the grand jury will not serve to overcome this presumption. United States v. Steel, supra, at p. 582. In Garin v. United States, 313 F.2d 641 (1st Cir. 1963) the defendants sought to have an indictment dismissed because of adverse publicity which they claimed was government inspired, and calculated to influence the grand jury. The First Circuit disposed of this contention by stating that there was no guarantee that a grand jury will be unbiased:

> "The appellants admit that their contention "presupposes" that there is either a right under the Fifth Amendment of the Constitution of the United States to be indicted by grand jurors free of calculated government-instigated prejudice or else the proper standards for enforcement of the criminal law in the federal courts sanction only indictment by a grand jury uninfluenced by improper forces generated by the prosecutor. They must also "presuppose" that they do not need to show that in fact the grand jury which indicted them did not perform its sworn duty to act with impartiality but instead was actuated government-inspired bias and prejudice. We are not prepared to grant these "presuppositions." So far as we are aware, none has the sanction of any decision of the Supreme Court of the United States

> and all have been rejected in one or another carefully considered opinion of a lower federal court. See United States v. Nunan, 236 F.2d 576, 592 et seq. (C.A. 2, 1956), cert. denied, 353 U.S. 912, 77 S. Ct. 661, 1 L. Ed. 2d 665 (1957); Beck v. United States, 298 F.2d 622 (C.A. 9, 1962), cert. denied, 370 U.S. 919, 82 S. Ct. 1558, 8 L. Ed. 2d 499 (1962); United States v. Dioguardi, 20 F.R.D. 33 (S.D.N.Y., 1956); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla., 1962), supra, 313 F. 2d 641, 645)".

c) Plaintiffs' Third and Fourth Causes of Action Are Premature

Plaintiffs unsupported conclusions that they will be indicted coupled with their unsupported conclusions that such indictments will be based upon insufficient evidence does not state a cause of action. There are so many imponderable "if" possibilities at this juncture, not the least of which is whether plainitffs will be indicted, that plaintiffs' fourth cause of action is premature. In Centracchio v. Garrity, 198 F.2d 382, 388 (1st Cir. 1952), a case involving a motion to suppress evidence prior to indictment the Court stated:

> "The petition, and petitioner's evidence in support thereof, did not disclose that petitioner had yet suffered any violation of his constitutional rights, either under the Fourth or Fifth Amendment. Whether the use against him at the forthcoming trial of

> the evidence now sought to be suppressed would be a violation of [illegible] constitutional rights under the Fifth Amendment may be regarded as doubtful".

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> "Our conclusion is that the district court should have dismissed the petition as lacking in equity, which of course would have been without prejudice to the right of petitioner, in the event of indictment, to raise at some appropriate stage, whether before trial or during the trial, the question as to the admissibility of the evidence disclosed by him in reliance on the Treasury's announced voluntary disclosure policy". Id. p. 388.

Specifically, with respect to the third cause of action, Martin v. Merola, 532 F.2 191 (2d Cir. 1976), is dispositive. In that case, the Second Circuit declined to decide issues similar to those presented here. The case was predicated upon alleged violations of the appellants' Constitutional rights as a result of newspaper reports of statements made by The Bronx District Attorney after appellants' arrest. The District Attorney admittedly stated that appellants had strong ties with organized crime families. The District Court granted appellees summary judgment motion on the grounds that the statements did not deprive appellants of their rights under the Constitution. The Court of Appeal dismissed the complaint on the grounds that the action was premature, stating:

> "Until the state prosecutions have been concluded, it is simply impossible to make any reasoned evaluation of plaintiffs' claim that they have been deprived of the opportunity to secure a fair trial by reason of the defendants' actions. Such a claim requires more than the mere speculation of damages contained in plaintiffs'

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> complaint: it requires a showing that plaintiffs have in fact been denied their due process rights. Rosenberg v. Martin, 478 F.2d 520, 525 (2d Cir.), cert. denied, 414 U.S. 872, 94 S. Ct. 102, 38 L.Ed.2d 90 (1973). We do not know, nor can the parties now illuminate, whether an impartial jury may be selected. Cf. Tunnell v. Wiley, 514 F.2d 971 (3d Cir. 1975). Similarly, we can only guess as to the desirability of a change in venue or the feasibility of a continuance.
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> * * *
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> Accordingly, we agree that plaintiffs' complaint must be dismissed on the basis that it is now premature. We do so without prejudice to its renewal at the conclusion of state criminal proceedings when the district court will be better able to assess the merits of plaintiffs' claim."

The grand jury is presumably in the process of evaluating evidence in connection with possible criminal activity by plaintiffs. Obviously additional evidence may be presented from various sources. The existence of a crime, and the identities of those involved clearly can not be determined until the end of the grand jury proceedings. In re Grand Jury Subpoena Duces Tecum Addressed to Provision Salesman and Dist. Union Local 627, AFL-CIO, 203 F. Supp. 575 (S.D.N.Y. 1961). It is, therefore, respectfully submitted that the fourth cause of action in the present case is no less premature than the Garrity and Merola cases and should be dismissed. See United States v. Wolfson, 269 F. Supp. 621 (S.D.N.Y. 1967).

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d) Fifth Cause of Action Does Not State A Claim

Plaintiffs' fifth cause of action fails to state a claim upon which relief may be granted. Simply, plaintiffs do not claim anything. All that is alleged is that defendant Naftalis somehow got a copy of an affidavit which was given to Mrs. Rosner by plaintiffs' attorney. Plaintiffs neither attempt to explain how defendant got the affidavit, nor obviously do they know. Clearly, without some allegation of wrongdoing on the part of defendants, this claim is without merit.* The most that this claim suggests is that Mrs. Rosner may have breached a trust by either giving defendant the affidavit or being careless with it. Suffice it to say that unless plaintiffs are alleging that Mrs. Rosner is a participant in the alleged conspiracy their claim should be dismissed.

III

THE COURT DOES NOT HAVE JURISDICTION OVER THE UNITED STATES

a) Congress Has Not Consented To Suit

28 U.S.C. § 1331, conferring general "federal question" jurisdiction, is not a consent by Congress to suits against the United States. While this section may support federal question jurisdiction in suits against the United States, plaintiff must first establish that the United States has waived sovereign immunity. E.g. Beale v. Blount, 461 F.2d

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* An alternative suggestion is that Mrs. Rosner used the affidavit in her case and was courteous enough to give her opponent a copy.

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1133, 1138 (5th Cir. 1972); Massachusetts v. Conner, 248 F. Supp. 656 (D. Mass., 1956), aff'd, 366 F.2d 778 (1st Cir. 1966); Cotter Corp. v. Seaborg, 307 F.2d 686, 692 (10th Cir. 1966). Congress has not, in fact, consented to be sued on the basis of the allegations set forth in the complaint. Hence as to defendant United States of America this action may not be entertained.

b) 28 U.S.C. §1346(a)(2) Does Not Establish A Waiver

Plaintiffs allege that this action is predicated upon 28 U.S.C. § 1346, which provides inter alia:

> "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property,

> or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The Supreme Court has recently held that the language of the jurisdictional grant of subsection (a)(2) with respect to the Court of Claims is dependent upon an independent statutory waiver by the United States of its immunity to suit. Stated somewhat differently, the United States Supreme Court has clearly held that federal district courts do not have jurisdiction under subsection (a)(2) to entertain a suit against the United States unless the plaintiff can show an independent basis for waiver of sovereign immunity.* United States v. Testan 44 U.S.L.W. 4245, 4247 (U.S. March 2, 1976)(No. 74-753), quoting United States v. Sherwood, 312 U.S. 584, 586 (1941). Accord, United States v. King, 395 U.S. 1 (1969).

b) The Federal Tort Claims Act Is Not A Waiver of Immunity In This Action

The Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 2671 et seq. (the "Act"), will not serve as a basis for waiver of immunity in this case. With respect to the fourth cause of action, which is in the nature of an action for malicious prosecution, plaintiffs are foreclosed from relying on the Act under 28 U.S.C. § 2680(h) which provides in pertinent part:

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* The district court's jurisdiction is obviously no greater than that of the Court of Claims under subsection (a).

> "The provisions of this chapter and section 1346(b) of this title shall not apply to --
>
> * * * *
>
> (h) Any claim arising out of . . . malicious prosecution, . . . Provided that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of . . . malicious prosecution. For purposes of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."*

The provision clearly exempts from application of the Act plaintiffs' fourth cause of action.

Moreover, plaintiffs have failed to file a claim with the appropriate administrative agency which is an absolute prerequisite to waiver of immunity under the Act. Finally, as to the injunctive relief requested in the complaint, § 1346(b) specifically states " . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . ." There is no mention of injunctive relief and indeed it is well settled that jurisdiction was not intended to be conferred for such relief. *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956); *Moon* v. *Takisak*, 501 F.2d 389 (9th Cir. 1974).

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* None of defendants are "empowered to execute searches to seize evidence, or to make arrests for violations of federal law". Compare, United States v. Riggs, 474 F.2d 699, 702 n.2 (2nd Cir.), cert. denied 414 U.S. 820 (1973); and 18 U.S.C. §§ 3052 (F.B.I. Agents).

c) The Extraordinary Remedies of "Mandamus", "Habeas Corpus" and "Declaratory Judgment" Are Not Applicable

Plaintiff's reliance upon 28 U.S.C. §§ 1361, 2201, 2202 and 2241 is clearly misplaced. Section 1361 provides:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff."

In order to sustain jurisdiction under this provision, there must be an allegation that defendants failed or refused to perform a non-discretionary duty imposed by law. *United States ex rel. Girard* v. *Helvering*, 301 U.S. 540, 534-44 (1937); *Fifth Avenue Peace Parade Committee* v. *Hoover*, 327 F. Supp. 233 (S.D.N.Y. 1971). Plaintiff request the Court to enjoin or proscribe certain conduct. These allegations do not, however, suggest that plaintiff is seeking to compel defendants to perform a "duty imposed by law". Hence, the mandamus statute has no application to the facts in this case and will not serve as a basis for jurisdiction.

Section 2241 is equally inapplicable to the instant action. Section 2241 provides, *inter alia*:

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

Essentially, "habeas corpus" is an extraordinary remedy by which a person in custody may attack the legality of that custody, and the traditional function of the remedy is to secure release from illegal custody. Preiser v. Rodriguez, 411 U.S. 475 (1973). Fay v. Noia, 372 U.S. 391 (1963). The fundamental criteria for employing this remedy is that the complaining party is being "unlawfully subjected to physical restraint." Preiser v. Rodriguez, at pp. 480-486.

Contrary to plaintiffs' jurisdictional assertions the Declaratory Judgment Act does not constitute consent by the United States to be sued. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); Anderson v. United States, 229 F.2d 675 (5th Cir. 1956); Zito v. Tesoriero, 239 F. Supp. 354 (S.D.N.Y. 1965).*

DEFENDANTS ARE NOT LIABLE TO PLAINTIFF

a) Defendants, Levi and Fiske Are Not Liable to Plaintiff

Defendants Levi and Fiske are not alleged to be personally responsible for the conduct which plaintiffs allege threaten their Constitutional rights. The doctrine of

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* While plaintiffs have also included the First, Fourth and Fifth Amendments to the Constitution in their jurisdiction allegations, they clearly do not confer jurisdiction. Nor do 18 U.S.C. §§ 2515 and 6001 et seq., and Rules (6)(41) and (42) Fed. R. Cr. P.

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respondeat superior has no application to federal officials for acts of their subordinates. Black v. United States, 534 F.2d 524 (2d Cir. 1976). Consequently, defendants Levi and Fiske are not proper parties to this action.

b) Defendants Naftalis and Aronwald Are Immune From Suit

It is axiomatic that prosecutors are immune from suit for acts committed in the performance of duties imposed upon them by law. The underlying basis of the fourth cause of action is the conduct of defendants Naftalis and Aronwald in the initiation of an alleged prosecution.* In Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court stated, as had many other courts earlier, that prosecutors are immune for all acts committed in the course of "initiating a prosecution." The Court relied heavily upon Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926). In Goff the appellant claimed that a special Assistant Attorney General of the United States, maliciously procured his grand jury indictment by false and misleading evidence. The Second Circuit found that the prosecutor was protected by the principles encompassing a prosecutor's absolute immunity.

> "In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States,

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* To the extent that defendant Fiske is purported to have personally participated in the alleged improper conduct, he too should be deemed included in this discussion.

> in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute and is grounded on principles of public policy." Id., at 406.

Thus, the principal has long been recognized in this circuit that suits in which a prosecutor is challenged for his conduct in initiating prosecutions may not be maintained. This principle has equal force and effect with respect to any acts which are committed by a prosecutor in the course of his duties. See Bradley v. Fisher, 80 U.S. 335 (1871); Scolnick v. Lefkowitz, 329 F.2d 716 (2d Cir. 1963), cert. denied, 379 U.S. 825 (1964); Gregorine v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). Plaintiff's request for injunctive relief surely creates no exception to this long standing doctrine. Any other result would in effect circumvent the clear intent of the substantial body of law surrounding the legal concept of a prosecutor's immunity from suit.

c) Plaintiffs Have Not Alleged That Defendants Sontag and Killen Committed Any Wrong

A thorough review of the complaint fails to suggest why Sontag and Killeen are named defendants. They are not alleged to have personally committed any acts which may have violated plaintiff's rights. Moreover, plaintiffs' request for relief is not directed at defendants Sontag and Killeen, nor could it be. Apparently plaintiffs have decided to "sue everyone". Plaintiffs have failed, however, to state a claim against defendants, Sontag and Killeen. Clearly as to these defendants, the complaint should be dismissed.

CONCLUSION

In accord with the foregoing it is respectfully submitted that defendants' motion to dismiss should, in all respects, be granted.

Dated: New York, New York
December 15, 1976

Respectfully submitted,

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GARY G. COOPER
Assistant United States Attorney

Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOUIS C. OSTRER, et al,
Plaintiffs
v. — No. 76 Civ. 3701 RJW
WILLIAM I. ARONWALD, et al,
Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS MOTION TO DISMISS

The Plaintiffs hereby oppose the Defendants Motion To Dismiss Pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure.

The grounds for their opposition are set out in a Memorandum of Law filed this day.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LOUIS C. OSTRER, RITA OSTRER,
JACK OSTRER, and DINA GELMAN, : 270

Plaintiffs, OPINION

-against- : 76 Civ. 3701

WILLIAM I. ARONWALD, ROBERT B.
FISKE, JR., ALAN NAFTALIS, MARVIN
SONTAG, JAMES KILLEEN, EDWARD H. :
LEVI, and THE UNITED STATES OF
AMERICA,
:
Defendants.

---------------------------------------x

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WARD, J.

Defendants William I. Aronwald, Robert B. Fiske, Jr., Alan Naftalis, Marvin Sontag, James Killeen, Edward H. Levi, and the United States of America move for an order pursuant to Rule 12(b), Fed. R. Civ. P., dismissing the complaint in this action. For the reasons hereinafter stated, the motion is granted.

Plaintiffs Louis C. Ostrer, his wife Rita Ostrer, his father Jack Ostrer, and his sister Dina Gelman bring this action seeking injunctive and other relief against certain government officials and the United States of America. They claim that the government is using unlawful and unethical means in an effort to coerce Louis C. Ostrer into testifying before a federal grand jury about his business associates, some of whom may have "connections with organized crime."

The complaint identifies the defendants as follows: Aronwald is employed by the United States Department of Justice and was Chief of the Organized Crime Strike Force for the Southern District of New York ("the Strike Force"). Naftalis also belonged to the Strike Force and is in charge of the investigation of which plaintiffs complain. Fiske is the United States Attorney for the Southern District of New York. Levi was the Attorney General of the United States. Both Sontag and Killeen were members of the Strike Force and are investigators with the Internal Revenue Service.

Plaintiffs seek to enjoin defendants from presenting any further evidence regarding plaintiffs to the grand jury, from obtaining indictments against plaintiffs prior to a hearing and decision on the merits, from seeking retaliation against plaintiffs or their immediate families, and from releasing to the news media and others incriminating stories about the plaintiffs.

In addition, plaintiffs ask the Court to order suppressed any evidence obtained by unlawful or unconstitutional means and the fruits thereof and to order the defendants to cease harassing and interfering with plaintiffs and their lawful activities and associations. Plaintiffs ask the Court to discharge the grand jury and to declare plaintiffs immunized with respect to the "alleged crimes, evidence being presented to, and indictments being sought from, the Grand Jury." Finally, the complaint demands an award of actual damages of twenty million dollars and punitive damages of thirty million dollars, plus litigation costs against the defendants jointly and severally.

The jurisdictional allegations of the complaint are lengthy. Listed are 18 U.S.C. §2515 et seq.; the first, fourth, fifth, and sixth amendments to the Constitution; Rules 6, 41 and 42, Fed. R. Crim. P.; 28 U.S.C. §§2201, 2202, 1331, 1346, 1361 and 2241; 18 U.S.C. §6001 et seq. and Murphy v. Waterfront Commission, 378 U.S. 52 (1964);

as well as, "this Court's inherent supervisory powers over the Federal Courts, Federal judicial and quasi-judicial proceedings, grand juries, and officers of the Court." At the outset, the Court must determine whether jurisdiction exists.

The Declaratory Judgment Act, 28 U.S.C. §§2201, 2202, does not confer subject matter jurisdiction. It provides a remedy where jurisdiction exists. Arthur v. Nyquist, 415 F. Supp. 904, 909 n.3 (W.D.N.Y. 1976).

28 U.S.C. §1346 is also pleaded as a jurisdictional base. The relevant portions of §1346 read as follows:

> United States as defendant
>
> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against

> the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Insofar as this is a suit for non-monetary relief, 28 U.S.C. §1346 does not provide a jurisdictional basis for plaintiffs. §1346(b) relates solely to the recovery of "money damages." §1346(a)(2) permits an award of damages, not injunctive or declaratory relief. Lee v. Thorton, 420 U.S. 139 (1975) (per curiam). Richardson v. Morris, 409 U.S. 464 (1973).

§1346(a)(2) does not in itself establish a waiver of sovereign immunity. United States v. Testan, 424 U.S. 392, 398 (1976); Duarte v. United States, 532 F.2d 850 (2d Cir. 1976). Further,

> Tucker Act jurisdiction (28 U.S.C. §1346(a)(2) is properly invoked where the claim does not exceed $10,000 or where the claimant waives any amount sought in excess of the Act's jurisdictional limit. See Perry v. United States, 308 F. Supp. 245 (D. Colo. 1970), aff'd, 442 F.2d 353 (10th Cir. 1971).

Commonwealth of Pennsylvania v. National Association of Flood Insurers, 520 F.2d 11, 25 (3d Cir. 1975). As noted above, plaintiffs claim damages in the millions.

Regarding plaintiffs' allegation of jurisdiction under §1346(b), defendants assert that plaintiffs have not filed an administrative claim, a prerequisite to suit. Altman v. Connally, 456 F.2d 1114, 1116 (2d Cir. 1972); Heaton v. United States, 383 F. Supp. 589, 590 (S.D.N.Y. 1974). Plaintiffs apparently do not contest this assertion.

Moreover, it appears that plaintiffs' claims would fall within the discretionary acts exception to the Federal Tort Claims Act, 28 U.S.C. §2680(a). See Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1256-57 (2d Cir. 1975); Smith v. United States, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967).

28 U.S.C. §1361 reads as follows:

> Action to compel an officer of the United States to perform his duty
>
> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Traditionally, jurisdiction under this section arises only if the defendant has "a clear duty to perform a non-discretionary act." Davis v. United States Dep't of HEW, 416 F. Supp. 448, 451 (S.D.N.Y. 1976). Conversely, mandamus is appropriate if the activity sought to be prevented is "so plainly prohibited as to be free from doubt." Naporano Metal & Iron Co. v. Sec'y of Labor, 529 F.2d 537, 542 (3d Cir. 1976).

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This Circuit recently stated:

> The prerequisites to the issuance of a writ of mandamus have been stated as (1) a clear right in the plaintiff to the relief sought; (2) a plainly defined and peremptory duty on the defendant's part to do the act in question; and (3) lack of another available, adequate remedy.

Billiteri v. United States Board of Parole, 541 F.2d 938, 946 (2d Cir. 1976). This Court finds these prerequisites lacking.

In Fifth Avenue Peace Parade Committee v. Hoover, 327 F. Supp. 238, 243 (S.D.N.Y. 1971), aff'd, 480 F.2d 326 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974), it was stated:

> a court must have the benefit of some specific statutes or regulations against which to measure the duties said to have been specifically ignored by the defendant or defendants. Plaintiffs have not made such a showing here. They rest upon the flat assertion that defendants have a duty not to violate the constitutional rights of plaintiffs. Although the proposition cannot be denied, I think that to allow it as a basis for federal jurisdiction under §1361 would be to stretch mandamus far beyond its proper limits.

Here, plaintiffs similarly assert that defendants have a duty not to violate their civil rights and not to engage in activities which constitute crimes under state law.

In Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973), the Second

Circuit refused mandamus to compel the United States attorney to investigate and prosecute certain state officers, indicating that to do so would be an unwise interference with prosecutorial discretion. This Court believes that mandamus is similarly unavailable to compel a United States attorney not to prosecute.

Plaintiffs claim to be "in custody" for purposes of this Court's power to grant a writ of habeas corpus. 28 U.S.C. §2241. The incidents of this restraint are not detailed. In Hensley v. Municipal Court, 411 U.S. 345, 351 (1973), the Supreme Court stated:

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

See United States ex rel. Scranton v State of New York, 532 F.2d 292 (2d Cir. 1976).

Two useful indicia of custody were suggested by the Court in Whorley v. Brilhart, 359 F. Supp. 539, 542 (E.D. Va. 1973)

> First, there must be present some sort of supervisory control over the person of the petitioner. His conduct, in other

> words, must be subject in one degree or another to the direction of judicial officers. Second, the existence of an imminent possibility of incarceration without a formal trial and criminal conviction may create such a restraint on liberty as to constitute custody. At the least, such a possibility taken together with even minimum supervisory control would result in a finding of custody. Hensley v. Municipal Court, [supra].

There is certainly no imminent possibility of incarceration present here. Furthermore, plaintiffs' conduct is really not subject to the direction of judicial officers nor to their supervisory control as is the behavior of a parolee or one on probation.

Although the definition of "in custody" has clearly broadened over time, it remains a concept with limits. Plaintiffs would have this Court go beyond those limits. In sum, they are simply not subject to severe or immediate restraint.

18 U.S.C. §6001 et seq. "Immunity of Witnesses" does not appear to serve as a jurisdictional grant in an action of this sort. That portion of Title 18 provides for a grant of immunity at the government's request. United States v. Morrison, 535 F.2d 223, 228-29 (3d Cir. 1976), cert. denied, 45 U.S.L.W. 3250 (U.S. Oct. 5, 1976).

At the time plaintiffs commenced this action, 28 U.S.C. §1331 provided in pertinent part:

> Federal question; amount in controversy;
>
> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Plaintiffs claim injury to certain of their constitutional rights as well as financial harm in that "their businesses [have been] nearly ruined." They allege $10,000 in damages, exclusive of interests and costs, and request a very substantial monetary award.

In Moore v. Betit, 511 F.2d 1004, 1006 (2d Cir. 1975), the Second Circuit observed:

> [T]he proposition that indirect damages and damages which are too speculative do not support jurisdiction . . . has traditionally been applied to damages which are intangible or to damages incapable of reduction to monetary terms such as free speech, child custody and loss of personal liberty. See e.g. Kiernan v. Lindsay, 334 F. Supp. 588, 594-5 (S.D.N.Y. 1971). . . .
>
> Federal courts have consistently held that absolute certainty in valuation of the right involved is not required to meet the amount in controversy requirement but rather the requirement is that there be a reasonable probability of an amount in controversy exceeding jurisdictional amount if an amount can be ascertained pursuant to some realistic formula. See e.g., Lawrence v. Oakes, 361 F. Supp. 432 (D. Vt. 1973); Scherr v. Volpe, 336 F. Supp. 882, 885 (W.D. Wis. 1971) aff'd 466 F.2d 1027 (7th Cir. 1972). Conversely, courts should dismiss only when it is clear to a legal certainty that jurisdictional amounts cannot be met. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-9, 58 S. Ct. 586, 82 L. Ed. 845 (1938),

Opelika Nursing Home, Inc. v. Richardson, 448 F.2d 658 (5th Cir. 1971) on remand 356 F. Supp. 1338, 1341 (M.D. Ala. 1973).

The jurisdictional amount requirement is ordinarily satisfied by a plaintiff's good faith allegation. The burden of demonstrating that the amount is as he claims falls upon plaintiff when defendant challenges the allegation. Moore v. Betit, supra at 1007. Defendants do not appear to contest plaintiffs' reliance on §1331 against the individual defendants.

The Court believes that the harm which plaintiffs claim to have sustained can be viewed in monetary terms and is sufficient to meet the jurisdictional amount requirement. The Court notes that after this lawsuit was filed 28 U.S.C. §1331 was amended to eliminate the $10,000 requirement when an action is brought, "against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

This Court also notes the determination of Judge Coffrin in Green v. Philbrook, 427 F. Supp. 834, 836 (D. Vt. 1977):

> [E]ffective October 21, 1976, Congress amended federal question jurisdiction, 28 U.S.C. §1331(a), by deleting the $10,000 amount in controversy requirement where the action is brought against the United States, its agencies, or any officer or employee thereof acting in his official capacity. Pub. L. No. 94-574, §2 (Oct. 21, 1976). The amendment is remedial in nature, see H.R. Rep. No. 1656, 94th Cong., 2d Sess. (1976), U.S. Code Cong. & Admin. News 1976, p. 6121, and it is intended to fill what has been termed "an unfortunate gap in the statutory jurisdiction of the

> federal courts," Wolff v. Selective Service Local Board No. 16, 372 F.2d 817, 826 (2d Cir. 1967). Thus, we think it proper to apply the amendment retroactively to grant jurisdiction over the defendant Secretary of Health, Education and Welfare even if there was no jurisdiction initially. Larkin v. Saffarans, 15 F. 147 (C.C.W.D. Tenn. 1883). In any event, were we to dismiss against the federal defendant now, the plaintiffs would be able to renew their action by refiling under the amended statute. The Court can envision no logical reason to require such a Sisyphean process.

Additionally, the Second Circuit has stated in finding jurisdiction under 28 U.S.C. §1331:

> We take judicial notice of the fact that membership in the bar of the Internal Revenue Service would be worth more than $10,000 to appellant, a certified public accountant; after the district court's decision in this case, moreover, Congress amended 28 U.S.C. §1331(a) to eliminate the amount-in-controversy requirement in suits against federal employees in their official capacities, Act of Oct. 21, 1976, Pub. L. No. 94-574, §2, 90 Stat. 2721.

Harary v. Blumenthal, Docket No. 76-6151 (2d Cir. May 19, 1977). Jurisdiction lies in this action under 28 U.S.C. §1331.

Furthermore, this suit is of unique concern to the federal courts. A non-statutory jurisdictional basis asserted by plaintiffs is the Court's "inherent supervisory powers over the Federal Courts, Federal judicial and quasi-judicial proceedings, grand juries, and officers of the Court."

We turn now to the prior proceedings in the action. On August 19, 1976, Judge Werker signed a temporary restraining order which prohibited defendants from presenting to the grand jury any evidence obtained directly or derivatively from unlawful wiretaps and electronic eavesdropping devices and from testimony given by any of the named plaintiffs as defendants under an immunity grant from the courts of New York State. A hearing was held on August 28, 1976 and an opinion was filed on August 31, 1976, denying plaintiffs' motion for a preliminary injunction. Ostrer v. Aronwald, 425 F. Supp. 962 (S.D.N.Y. 1976).

Louis Ostrer was the subject of an illegal wiretap by the New York district attorney's office from October 25, 1972 through February 21, 1973. On the latter date, the district attorney's office conducted a search and seizure. Plaintiffs claim that evidence thus illegally obtained became the basis of the present grand jury probe into possible violations by them of Internal Revenue Service and other criminal statutes.

Additionally, in February and March of 1974, Louis Ostrer testified before a New York County grand jury under a state grant of transactional immunity. Plaintiffs claim that this testimony has come into the hands of the United States attorneys involved in the current probe.

In determining the motion before him, Judge Werker reviewed, "sworn statements by Alan Naftalis, Special Attorney, [three other non-defendants] and William I. Aronwald, Special

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Attorney, denying any use of tainted evidence and any discussions with members of the other governmental authorities in the investigation of this case." Judge Werker concluded that, "[t]he evidence before the court indicates that the Strike Force has made every effort to conduct an independent investigation, and there is no evidence before the court that would indicate that this goal has not been achieved." Id. at 964.

After discussing recent rulings regarding the inadvisability of hampering a grand jury with "minitrials and preliminary showings" during the course of its investigation, United States v. Dionisio, 410 U.S. 1, 17 (1973); United States v. Calandra, 414 U.S. 338 (1974), Judge Werker concluded that in light of the "substantial and credible evidence" that the evidence being presented to the grand jury was not directly or indirectly the product of illegally obtained evidence, he was unable to rule as a matter of law that such presentations must be barred as tainted. Judge Werker observed that a decision could therefore only be arrived at after a hearing as to each bit of evidence and an examination of its origins, a procedure clearly at variance with the holdings of the Supreme Court. Judge Werker stated:

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> The proceeding before the Grand Jury appears on its face to be proper. The Government has provided substantial testimony that the evidence before the grand jury is not tainted. To make any other determination, this court would be required to conduct an extensive and lengthy suppression hearing. This court will not interfere with the grand jury proceeding to such an extent.
>
> Furthermore, the plaintiffs have failed to show the absence of an adequate remedy at law. If, as and when an indictment is returned, the plaintiffs may move to dismiss the indictment and to suppress excludable evidence.

_Id_. at 965.

Defendants assert that this Court should decline to consider the first and second causes of action, arguing that the issues raised therein are barred by the "law of the case." The prior determinations they cite are the opinion of Judge Werker previously discussed and a decision by Judge Conner, _In the Matter of a Grand Jury Subpoena of William Kilroy_, M11-188 (S.D.N.Y. Aug. 17, 1976). Judge Conner, referring to sworn statements of Naftalis and others, determined that the Government had

> countered the instant application by sufficient proof that the investigation leading to the present grand jury inquiry was conducted wholly independently of and, indeed, in ignorance of the contemporaneous state probe, and that the information gathered by the federal agencies was not derived, even indirectly, from the concededly illegal state wiretap. See _United States_ v. _Buscaglia_, 518 F.2d 77 (2d Cir. 1975).

Defendants' argument is misplaced. Plaintiffs were not parties in the matter before Judge Conner. Judge Werker's decision was a denial of a preliminary injunction. The standard applied to a motion for this extraordinary relief is unique, as is the remedy itself.

> [A] preliminary injunction . . . is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness.

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953). Plaintiffs seek permanent as well as preliminary relief. Neither the grant nor the denial of a preliminary injunction constitutes an ultimate determination of the merits of a controversy. See Jacobson & Company Inc. v. Armstrong Cork Co., 416 F. Supp. 564, 570 (S.D.N.Y. 1976), aff'd, 548 F.2d 438 (2d Cir. 1977).

However, although this Court is not bound by Judge Werker's decision its reasoning recommends that the same course be followed.

Interference with the grand jury is by no means a favored practice. The Court of Appeals has stressed, "the strong public policy of this Circuit of not permitting disruption of grand jury proceedings absent compelling reasons." United States v. Grusse, 515 F.2d 157, 158 (2d Cir. 1975). In a suit involving a witness' invocation of 18 U.S.C. §3504, the Court observed:

> Accusations of misconduct based on unsupported suspicion or patently frivolous contentions should not be deemed "claims" sufficient to require any further inquiry and thus delay orderly proceedings of the grand jury. This conclusion is mandated by the wide latitude historically accorded to grand juries and by the need to avoid delay in grand jury investigations which neither adjudicate guilt or innocence nor proceed in the adversarial tradition of the trial courtroom.

In re Millow, 529 F.2d 770, 774 (2d Cir. 1976).

As Judge Werker noted, the Supreme Court has voiced its disapproval of interference with the grand jury.

> Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. Cf. United States v. Ryan, 402 U.S. 530, 532-533; Costello v. United States, 350 U.S. 359, 363-364; Cobbledick v. United States, 309 U.S. 323, 327-328. The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.

United States v. Dionisio, supra at 17-18.

Plaintiffs' citation to 18 U.S.C. §2515 et seq. as a jurisdictional base clearly refers to the first and second causes of action. Section 2515 itself is entitled

"Prohibition of use as evidence of intercepted wire or oral communications." Later sections provide for authorization for interception, authorization for disclosure and use, procedure for interception, and for reports of interception. Finally, §2520 bears the title "Recovery of civil damages authorized."

It has already been established that Title 119, which includes §2515 et seq., does not provide for suppression hearings during grand jury proceedings. In In re Vigorito, 499 F.2d 1351, 1354 (2d Cir.), cert. denied, 419 U.S. 1056 (1974), the Second Circuit referred to its prior decision In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974), and observed:

> We found that the legislative history of section 2518(10), the only provision in Title 119 that specifically provides for suppression hearings, indicates that Congress did not intend Title 119 to interfere with traditional methods of conducting grand jury proceedings so long as the interception is not patently illegal:
>
> > "As noted, though Congress prescribed that illegal wiretap evidence must be excluded from all grand jury proceedings, hearings to suppress evidence were not to be permitted during such proceedings. These seemingly inconsistent policy determinations can be reconciled only by interpreting the statute as requiring exclusion only when it is clear that a suppression hearing is unnecessary, as when the Government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent, such as, for example, when no prior court order was obtained, or when the unlawfulness of the Government's surveillance has

> been established in a prior judicial proceeding. In these situations both statutory policies - the exclusion of illegally acquired evidence and the maintenance of unimpeded grand jury proceedings - are served. But where illegality is claimed and, if established, can be established only by way of a plenary suppression hearing, one important aim of the legislation would be frustrated." 491 F.2d at 1161-1162.

Section 2518(10)(a) provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that --
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Discussing this provision in Gelbard v. United States, 408 U.S. 41, 59-60 (1972), the Supreme Court distinguished witnesses from defendants and potential defendants.

> The congressional concern with the applicability of §2518(10)(a) in grand jury proceedings, so far as it is discernible from the Senate report, was apparently that defendants and potential defendants might be able to utilize suppression motions to impede the issuance of indictments: "Normally, there is no limitation on the

> character of evidence that may be presented to a grand jury, which is enforcible by an individual. [*United States* v. *Blue*, 384 U.S. 251, 86 S. Ct. 1416, 16 L. Ed. 2d 510 (1966).] There is no intent to change this general rule." S. Rep. No. 1097, 90th Cong., 2d Sess., 106 (1968); U.S. Code Cong. & Admin. News, p. 2195. The "general rule," as illustrated in *Blue*, is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government "acquire[d] incriminating evidence in violation of the [law]," even if the "tainted evidence was presented to the grand jury." 384 U.S. at 255 and n. 3, 86 S. Ct. 1419; see *Lawn* v. *United States*, 355 U.S. 339, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958); *Costello* v. *United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956). But that rule has nothing whatever to do with the situation of a grand jury witness who has refused to testify and attempts to defend a subsequent charge of contempt.

The only conceivable predicate within Title 119 for a civil action of this sort would be §2520, authorizing civil damage suits, which provides:

> Recovery of civil damages authorized
>
> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person --
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
>
> A good faith reliance on a court or legislative authorization shall constitute a complete defense

> to any civil or criminal action brought under this chapter or under any other law.

Determination of any such damages at this time, however, would require substantial interference with the grand jury.

In *Application of the United States Authorizing the Interception*, 413 F. Supp. 1321 (E.D. Pa. 1976), a movant sought disclosure of a wiretap order, supporting affidavits, and the results of the surveillance. The government opposed, claiming that disclosure would threaten an on-going grand jury investigation. Disclosure was denied. The movant also argued that access was necessary for the preparation of a §2520 suit, that he should not be forced to wait for such relief, and that the statute of limitations might preclude him from any remedy in the future.

The court, nonetheless, determined that the movant's interest was outweighed by the potential prejudice to the grand jury probe. On the statute of limitations problem, the court stated:

> This contention may be disposed of by reference to the broad rule that *whenever some paramount authority prevents a person from exercising his legal remedy, the statute is tolled for that period during which he has been so thwarted.* *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218, 19 L.Ed. 895 (1970); Davis v. Wilson, 349 F. Supp. 905 (E.D. Tenn.) *aff'd mem.*, 471 F.2d 653 (5th Cir. 1972); 51 Am. Jur. 2d, Limitation of Actions §140 (1970). It would be manifestly unjust to hold that the clock is running on movant's cause of action during a period when this court and the Government have

> prevented him from obtaining the information necessary to bring that claim. We do not believe that it was the intent of Congress in enacting §§2518(8)(d) and 2520 to fashion this type of draconian legislation. To hold that the limitations period is running on any potential civil claim during the period when a prospective claimant is prevented by court order from discovering the wiretap materials he needs in order to pursue such a claim would produce just such a result. Specifically, movant, in the case at bar, may rely upon our decision that the statute of limitations must and will be suspended as to any civil cause of action he may have under this Act until such time as he is able to obtain the information necessary to ascertain the viability of civil suit under Section 2520. On this basis we reject movant's final ground for relief.

Similarly, plaintiffs' claims must be deferred.

Plaintiffs' third cause of action accuses defendants of conspiracy to harass and defame them in order to deprive them of their livelihood. The means allegedly employed by defendants include calling the plaintiffs to appear before different grand juries at the same time; appropriating plaintiffs' business records; leaking defamatory stories to the media; making statements in court and before congressional committees which were later published; trying to discourage plaintiffs' business associates from dealing with them; and engaging in overlapping and repetitive investigations of plaintiffs.

Defendants are portrayed by plaintiffs as waging a virtual vendetta against them. Insofar as plaintiffs are targets of a grand jury probe, this is probably a natural

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reaction. What is to a United States attorney the vigorous pursuit of suspected criminals is to the potential defendant a relentless persecution. Plaintiffs' conspiracy claims consist largely of conclusory allegations.

Louis Ostrer's affidavit traces a succession of scrapes with the government. He names some names of those he feels have wronged him, but these names are not those of the defendants. A prior criminal conviction plus earlier investigations are presented as a huge conspiracy and laid at the door of the defendants.

Certain of the plaintiffs' claims are reminiscent of Jacobson v. Organized Crime & Racketeering Section, 544 F.2d 637, 638 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3666 (U.S. Apr. 5, 1977). Jacobson and Ranger Bakers, Inc., a company of which he was president, sued the Internal Revenue Service and four agents. As the Second Circuit observed:

> Ranger maintains that its financial problems were caused by the concerted efforts of the Organized Crime and Racketeering Section of the Department of Justice and the Internal Revenue Service, which, it claims, were resolved to drive it out of business. Appellants allege that the Organized Crime Section, carrying on a "personal vendetta" against the Jacobson family (App. 7a, 26a), "leaked" to a New York City newspaper a story which appeared in May 1975 to the effect that Jacobson was a front for his father, Sam, who, the article asserted, manages an underworld gambling cartel. Appellants also allege vaguely that the Organized Crime Section intimidated and spread "false and malicious stories"

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> among plaintiffs' customers, vendors, and banks in an effort to dissuade them from dealing with or extending credit to appellants. They claim it was as a result of the consequent loss of business and credit that they were unable to meet their federal tax obligations.

The Second Circuit noted the "use of the rhetoric of conspiracy and harassment, supplemented by claims of many millions of dollars of damages against these individual revenue agents." Id. at 640. The Court affirmed the dismissal of the complaint saying, inter alia, that, "[w]ith respect to the large money damage claims against the IRS and the individual revenue agents, the vague and conclusory allegations clearly state no claim for relief." Id. at 639.

Similarly, here, plaintiffs' broad brush portrayal of the defendants as vengeful conspirators lacks sufficient substance to state a claim.

A claim of conspiracy to violate constitutional rights cannot depend upon vague and conclusory allegations but must be based upon at least some allegations of facts indicating such a deprivation. See Jacobson v. Organized Crime & Racketeering Section of U.S. Dep't of Justice, supra; Black v. United States, 534 F.2d 524 (2d Cir. 1976); Koch v. Yunich, 533 F.2d 80, 85 (2d Cir. 1976).

Defendants claim that Levi and Fiske are not liable to plaintiffs because they are not alleged to be personally responsible and because respondeat superior does not apply, citing Black v. United States, supra. The complaint describes

Levi and Fiske as follows:

> 10. ROBERT B. FISKE, JR., is the United States Attorney for this District, and as such he has general supervision and authority over prosecutions and investigations in the District, and over the presentation and signing of indictments.
>
> * * *
>
> 14. EDWARD H. LEVI is the Attorney General of the United States, and as such he has general and ultimate authority over and supervision of the Department of Justice and any and all Organized Crime Strike Forces.

The Second Circuit, in Black v. United States, supra at 527-28, stated:

> In an effort to limit vexatious litigation and to minimize interference with the orderly workings of government, it is required in suits against state officials under 42 U.S.C. §1983 that the plaintiff allege the defendant's direct and personal responsibility for the purportedly unlawful conduct of his subordinates. In Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir.), cert. denied, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 32 (1973), we stated with regard to state officials that "the general doctrine of respondeat superior does not suffice . . ." We see no reason why the pleading requirements should be any different in actions against federal officials. Cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339, 1346-7 (2d Cir. 1972). Insofar as appellants' complaint is silent in this critical regard, it is fatally defective.

The allegations regarding Levi and Fiske do not suffice to state direct and personal responsibility for the purported misconduct of their subordinates. See Morpurgo v. Board of Higher Education, 423 F. Supp. 704, 713 (S.D.N.Y. 1976). Moreover, there are immunity defenses available to the individual defendants.

Certain of the defendants are federal prosecutors. The Supreme Court, in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) ("*Imbler*") found a state prosecuting attorney acting within his duties absolutely immune from a §1983 suit brought by an accused. Mr. Justice Powell, speaking for the Court, examined the concept of prosecutorial liability. He discussed the common-law immunity of prosecutors and noted *Yaselli* v. *Goff*, 275 U.S. 503 (1927) (per curiam). In that case, a special assistant to the United States Attorney General was accused of having obtained a grand jury indictment maliciously and without probable cause through the intentional introduction of false evidence. The complaint was dismissed by the district court and this decision was affirmed by both the Court of Appeals and the Supreme Court.

Mr. Justice Powell went on to observe:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. *Bradley* v. *Fisher*, 13 Wall., at 348; *Pierson* v. *Ray*, 386 U.S., at 554. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Imbler, at 424-25. The Court noted that prosecutors often act under time pressure and other constraints and could make decisions which would create colorable claims of deprivation of constitutional rights. Id. at 427. The entire criminal justice system could be adversely affected by a prosecutor's fear that any misstep might subject him to liability.

The Court summed up its determination as follows:

> We conclude that the considerations outlined above dictate the same absolute immunity under §1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:
>
> > "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." Gregoire v. Biddle, 177 F.2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950).

Id. at 427-28.

Although the defendant in Imbler was a state and not a federal prosecutor, it seems clear particularly in light of the Court's citation of Yaselli v. Goff, supra, that the defendant federal prosecutors would be eligible for the absolute immunity discussed in that case. Similarly, although this is of course not a §1983 suit, it is a civil suit charging constitutional deprivation and thus the Imbler reasoning would apply. Furthermore, Imbler has been held applicable to United States attorneys. Brawer v. Horowitz, 535 F.2d 830, 834 (3d Cir. 1976); Stockheimer v. Underwood, 428 F. Supp. 192, 195 (W.D. Wis. 1977).

The relevance of Imbler to the facts of this case must be examined. The Supreme Court stated in a footnote:

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required, constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

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Id. at 431, n. 33. The question, thus, remains whether the defendants' conduct is of the sort to which absolute immunity applies. This Court believes that it is. The policy considerations which underly the immunity doctrine strongly argue that prosecutors engaged in a grand jury investigation, in dealing with potential defendants, should not be subject to suits of this kind. In Mobil Oil Corp. v. Lefkowitz, Docket No. 74 Civ. 4088 (S.D.N.Y. Apr. 26, 1977), Imbler was found to be applicable to the New York State Attorney General when conducting a grand jury investigation. See also, Stockheimer v. Underwood, supra.

As members of the Strike Force, Sontag and Killeen may also be able to avail themselves of the defense of absolute immunity. If not, and if they are only entitled to qualified immunity, the Court nonetheless finds that they have established their good faith and reasonable grounds for their actions. In discussing the qualified immunity of certain officials of the executive branch in Economou v. U.S. Department of Agriculture, 535 F.2d 688, 696 (2d Cir. 1976), the Second Circuit stated:

> If, . . . the plaintiff's claims are baseless, as defendants maintain, our holding does not necessarily require them to face an expensive, protracted or wasteful trial. Should the defendants by affidavit set forth undisputed facts demonstrating the reasonableness of their action, buttressed by affidavits of their good faith, and the plaintiff then fail to respond under oath with "specific facts

> showing that there is a genuine issue for trial" regarding the defendants' good faith or the existence of reasonable grounds for their action, summary judgment dismissing the complaint might be appropriate.

A reading of the affidavits submitted by Sontag and Killeen and those submitted on behalf of plaintiffs causes the Court to conclude that the immunity defense has been established.

Plaintiffs, in their fourth cause of action, claim that Louis Ostrer is the victim of a campaign by defendants to obtain information from him about certain of his associates. This campaign allegedly includes threats to indict members of his family including the other plaintiffs.

Undoubtedly, plaintiffs find the scrutiny of a grand jury investigation uncomfortable. However, the Supreme Court in United States v. Calandra, supra at 345, stated:

> The duty to testify has long been recognized as a basic obligation that every citizen owes his Government. Blackmer v. United States, 284 U.S. 421, 438 (1932); United States v. Bryan, 339 U.S. 323, 331 (1950). In Branzburg v. Hayes, supra, at 682 and 688, the Court noted that "[c]itizens generally are not constitutionally immune from grand jury subpoenas. . ." and that "the longstanding principle that 'the public . . . has a right to every man's evidence' . . . is particularly applicable to grand jury proceedings." The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as "so necessary to the administration of justice" that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure. Blair v. United States, 250 U.S., at 281. Further-

> more, a witness may not interfere with the course of the grand jury's inquiry. He "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his." Id., at 282. Nor is he entitled "to challenge the authority of the court or of the grand jury" or "to set limits to the investigation that the grand jury may conduct." Ibid.

That a citizen may be a potential defendant does not alter his obligation. See United States v. Mandujano, 425 U.S. 564, 573-575 (1976). See also, In re Cueto & Nemikin, Docket Nos. 77-1101, 77-1102 (2d Cir. Mar. 28, 1977).

Defendants argue that the third and fourth causes of action in the complaint are premature. They cite Martin v. Merola, 532 F.2d 191 (2d Cir. 1976). There, the Bronx District Attorney and two of his assistants were sued under 42 U.S.C. §1983 after they issued press releases characterizing certain defendants as "vultures" and linking them to "crime families." The Second Circuit ordered the complaint dismissed stating that until the state prosecutions were finished it would be impossible to determine if fair trial rights had been violated, if an impartial jury could be selected, if a change of venue was in order, and if ascertainable damages had been sustained. Id. at 194. Principles of comity were also invoked. Id. at 194-95. In an observation which bears upon the instant case, the Court noted:

> We believe the requirement that defendants wait until criminal proceedings have terminated before asking a federal court for damages against the prosecutor will tend to eliminate those suits which might be brought for purposes of harassment.

Id. at 195.

In Centracchio v. Garrity, 198 F.2d 382 (1st Cir.), cert. denied, 344 U.S. 866 (1952), a taxpayer petitioned pre-indictment for suppression of certain evidence he had given to agents of the Bureau of Internal Revenue on the understanding that no prosecution would result. He also sought an order restraining the United States attorney from presenting the evidence to the grand jury or at trial. The court stated that, "[j]udicial interference of this sort with the action of a United States attorney in the administration of the criminal law, at a pre-indictment stage, must, we think, be regarded as the exception rather than the rule." Id. at 387. The court concluded that the district court should have dismissed the petition for lack of equity without prejudice to the taxpayer's right to challenge the evidence's admissibility after indictment before or during the trial. Id.

The objection to this action as premature is further buttressed by a recent Second Circuit decision. Matter of Doe, 546 F.2d 498, 501 (2d Cir. 1976)

> We are asked to enjoin the investigation of a criminal offense by a grand jury, whose broad investigative powers have often been

> emphasized by the Supreme Court and by this court. E.g., Calandra v. United States, 414 U.S. 338, 343 (1974); In re Subpoena of Persico, 522 F.2d 41, 55-56 (2d Cir. 1975). The request is made in the context of a mere investigation and is brought here prematurely. If the grand jury refuses to indict Doe for obstruction of justice and to indict Roe and X Corporation for tax violations, none of them will have to prepare a defense. Even if indictments are obtained, appellants will be able to make the same claims of prosecutorial misconduct and infringement of their constitutional right to prepare an adequate defense by motions in the district court and by an appeal from convictions, if any.

Accordingly, the claims raised by plaintiffs must be deferred until a later date.

Plaintiffs ask the Court to discharge the grand jury. This request must be denied. Nixon v. Sirica, 487 F.2d 700, 790 (D.C. Cir. 1973) states:

> Although a court has no authority to order the grand jury to return an indictment (or to refuse to do so), it may exercise control over the grand jury in several significant respects. The court summons and empanels the grand jury and apparently has broad discretion to discharge it for any reason.

In regard to discharge, that court in turn cited Rule 6(g), Fed. R. Crim. P., which reads in pertinent part:

> Discharge and Excuse. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months.

Also cited was United States v. Smyth, 104 F. Supp. 283, 292 (N.D. Cal. 1952), whose authority for the power to discharge was again Rule 6(g), a federal case, In re National Window Glass Workers, 287 F. 219, 225 (N.D. Ohio 1922), which stated "[t]he District Court may discharge a grand jury whenever in its judgment it deems a continuance of the sessions of such a jury unnecessary," an Indiana case, and the following observation:

> In a nationally famous incident, Judge Geiger, of the Federal District Court in Wisconsin, discharged a jury to prevent the return of an indictment. He was threatened with impeachment proceedings by Attorney General Cummings, but the grand jury was discharged. New York Times, 1937, December 18, p. 1, col. 3; December 20, p. 1, col. 2, p. 4, col. 6; 1938, January 12, p. 4, col. 4; January 23, p. 5, col. 1; January 25, p. 6, col. 6; January 26, p. 4, col. 2; January 31, p. 1, col. 2; February 16, p. 7, col. 2.

United States v. Smyth, supra at 292, nn. 33 & 34. These are hardly compelling authorities for so drastic a procedure as discharge of a grand jury.

Plaintiffs would also have the Court grant them immunity from prosecution. At the pre-indictment stage, this would surely be floundering in the dark. The Court does not know what evidence the grand jury has heard or will hear, nor does it know with what offenses plaintiffs might ultimately be charged. In Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968), cited by plaintiffs, a traffic charge brought as retaliation was dismissed with no objection by the government. Plaintiff also points to United States v. McLeod, 385 F.2d 734 (5th Cir. 1967), in which officials who had pursued a campaign of harassing voting rights workers through prosecutions for violations of local vagrancy, traffic and other laws were ordered to restore those individuals to their status quo ante. In neither instance was immunity granted before an offense h[illegible] been charged.

Nevertheless, plaintiffs insist that meaningful relief can only be granted pre-indictment. The stigmatization which accompanies an indictment cannot be denied. This consequence, however, does not justify the Co[illegible]mpeding the grand jury. The Court cannot order the [illegible] jury to refuse to return an indictment. Nixon v. Sirica, supra at 790.

Plaintiffs also ask the Court for broad restraints on the actions of the defendants. Neither the facts of this case nor the applicable law would justify such restrictions.

The prosecutor's decision to seek an indictment is subject to judicial scrutiny only on a substantiated claim of "racial or similar discrimination." United States v. Strutton, 494 F.2d 686, 688 (2d Cir. 1974). See United States v. Smith, 523 F.2d 771, 782 (5th Cir. 1976), cert. denied, 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976); United States v. Niedelman, 356 F. Supp. 979, 984 (S.D.N.Y. 1973). One primary obstacle to judicial intervention in matters of prosecutorial discretion is the separation of powers doctrine.

> Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967), quoted in Russell v. Parratt, 543 F.2d 1214, 1216 (8th Cir. 1976).

The United States attorney is both an officer of the Court and an official of the executive department. It is in the latter capacity that he exercises prosecutorial discretion.

> [T]he problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary. The reviewing courts would be placed in the undesirable and injudicious posture of becoming "superprosecutors."

Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973). Moreover, the status of the United States attorney as an executive official does not divest him of the absolute immunity discussed supra. See Economou v. U.S. Department of Agriculture, supra at 689. In United States v. Cohen, 231 F. Supp. 171, 172 (S.D.N.Y. 1964), the Court said:

> It is concluded, . . . that neither under Rule 41(e) nor otherwise may this Court summarily enjoin the United States Attorney from conducting correspondence, whether about income taxes or anything else. This Court has no general supervisory powers over the United

> States Attorney; he is a public official having independent responsibilities as such. The motion is denied therefore so far as it seeks to enjoin correspondence of the United States Attorney.

In United States v. Steel, 238 F. Supp. 580 (S.D.N.Y. 1965), a defendant moved to have an indictment against her dismissed. She claimed that an assistant United States attorney had approached her in regard to testifying in another case. She did not cooperate and he told her, "that her status as a co-conspirator but not defendant in the then pending indictment 'would undoubtedly be re-evaluated if she continued to refuse to cooperate.'" Id. at 581. She remained adament and a second indictment issued naming her as a defendant. Her motion to dismiss was predicated upon denial of due process in that the indictment was the result of her refusal to testify and in that no evidence of crime had been presented to the grand jury. Her evidence was the statement by the assistant United States attorney.

The Court denied her the relief requested noting that the grand jury, not the prosecutor, votes an indictment, that a presumption of regularity attaches to grand jury proceedings, and that the movant's speculation as to why she had been indicted did not overcome this presumption. Id. at 582. These considerations seem at least as compelling here where pre-indictment relief is sought.

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Neither the facts of this case nor the applicable law warrant the restrictions plaintiffs ask the Court to place upon the defendants.

The fifth cause of action in the complaint arises out of the defendants' purported acquisition, without plaintiffs' consent, of an affidavit prepared for litigation purposes by the latters' attorneys. This incident is said to violate plaintiffs' sixth amendment right to the effective assistance of counsel.

Apparently, according to the complaint, counsel for one of the plaintiffs, Alan Dershowitz, entrusted certain confidential documents relating to this action to another attorney, Nancy Rosner. When Rosner appeared later that same day in Part I to argue against defendant Naftalis she had among her papers one of these documents, a draft of a proposed affidavit of plaintiff Louis C. Ostrer. At some time during the argument, Naftalis acquired the draft affidavit, which was subsequently read by both Naftalis and Aronwald.

This "intrusion" is said to be actionable. Left to be determined are the degree of culpability and the extent of prejudice suffered. The Fourth Circuit's opinion in Bursey v. Weatherford is cited, 528 F.2d 483 (1975). However, that decision was subsequently reversed by the Supreme Court. 45 U.S.L.W. 4154 (U.S. Feb. 22, 1977). Both that case and a recent Second Circuit decision, *Klein* v. *Smith*, Docket No. 76-2107 (May 3, 1977), which discussed *Bursey* v. *Weatherford*, dealt with a criminal defendant's efforts to overturn his conviction.

At this stage, plaintiffs cannot prove a violation of sixth amendment rights since the sixth amendment right to counsel does not arise prior to the institution of criminal proceedings. *United States* v. *Mandujano*, *supra* at 581 *citing* *Kirby* v. *Illinois*, 406 U.S. 682 (1972).

Certainly the sole remedy for the unique wrong asserted in plaintiffs' fifth cause of action is suggested by the Second Circuit in *Matter of Doe*, *supra* at 501. If actionable wrong there was, it must fall within the categories of prosecutorial misconduct and infringement of the right to prepare an adequate defense. The remedies, the Court of Appeals has indicated, are post indictment. Furthermore, since the draft affidavit, in final form, is now apparently part of the record, the degree of prejudice to plaintiffs seems minimal if not non-existent.

Plaintiffs seek drastic interference with a grand jury and far reaching restrictions on the activities of government prosecutors. They ask for huge monetary damages. Neither the facts nor the applicable law argue persuasively that they are entitled to such remedies. The complaint fails to state a claim upon which relief can be granted. Accordingly, defendants' motion to dismiss is granted.

It is so ordered.

Dated: June 21, 1977

Robert

U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LOUIC C. OSTRER, RITA OSTRER,
JACK OSTRER, and DINA GELMAN,

Plaintiffs,

-against-

WILLIAM I. ARONWALD, ROBERT B. FISKE, JR., ALAN NAFTALIS, MARVIN SONTAG, JAMES KILEEN, EDWARD H. LEVI, and THE UNITED STATES OF AMERICA,

Defendants.

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NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Plaintiffs in the above-captioned action, namely Louis C. Ostrer, Rita Ostrer, Jack Ostrer, and Dina Gelman, hereby appeal the order and judgment in this action, dated June 21, 1977, signed by Hon. Robert J. Ward, U.S.D.J. for the Southern District of New York, allowing the defendants' motion to dismiss the complaint, to the United States Court of Appeals for the Second Circuit.

Dated July 19, 1977.

By their attorneys,

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